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Record No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DAVID W. CHILDRESS,
AUGUSTUS G. HARVEY, III,
VINCENT J. MATASSA,
HENRY W. MEASE,
HOWARD S. NOYES,
DANIEL G. QUINNEY,
FLORIAN E. STACHURA,

Petitioners,

v.

CITY OF RICHMOND, VIRGINIA;
JERRY A. OLIVER, Chief of Police of the
City of Richmond, Virginia, in his official capacity
as Chief of Police of the City of Richmond; and
MARTY M. TAPSCOTT

Respondents.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether white male police officers have standing under Title VII to assert claims as persons aggrieved for hostile environment in the workplace resulting from the employer's race and sex discrimination against fellow black and female police officers.

2. In the absence of such standing, do white male police officers have statutory protection under Title VII from retaliation by their employer resulting from the white male police officers (a) having opposed the employer's race and sex discrimination against their fellow black and female police officers, and (b) having filed with the EEOC charges of discriminatory hostile environment.

PARTIES TO THE PROCEEDING

1. David W. Childress; Augustus G. Harvey, III; Vincent J. Matassa; Henry W. Mease; Howard S. Noyes; Daniel G. Quinney; Florian E. Stachura are the seven white male police officers who were plaintiffs in the district court and appellants in the Fourth Circuit Court of Appeals. Virginia M. Downey and Janice M. Thompson were plaintiffs in the district court proceedings whose claims were voluntarily settled by the parties.

2. The City of Richmond, Virginia; Jerry A. Oliver, Chief of Police of the City of Richmond, Virginia; and Marty M. Tapscott, former Chief of Police of the City of Richmond, Virginia were defendants in the district court proceedings, and appellees and petitioners in the proceedings in the Fourth Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

David W. Childress; Augustus G. Harvey, III; Vincent J. Matassa; Henry W. Mease; Howard S. Noyes; Daniel G. Quinney; and Florian E. Stachura, respectfully petition for a writ of certiorari to review the *en banc per curiam* decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The two Opinions and Orders of the United States District Court for the Eastern District of Virginia are reported at *Childress v. City of Richmond*, 907 F.Supp. 934 (E.D. Va. 1995) (App. 1a) (dismissing Title VII hostile environment claim and § 1983 First Amendment and due process claims); and at *Childress v. City of Richmond*, 919 F.Supp. 216 (E.D. Va. 1996) (App. 17a) (dismissing Title VII "participation clause" and "opposition clause" retaliation claims). The original panel opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Childress v. City of Richmond*, 120 F.3d 476 (4th Cir. 1997) (App. 27a). The *en banc per curiam* opinion of the Fourth Circuit, affirming the district court's judgment in its entirety, is found at *Childress v. City of Richmond*, 134 F.3d 1205 (4th Cir. 1998) (App. 44a).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 15, 1998. This was the *en banc per curiam* decision of the Fourth Circuit (App. F, 44a-45a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title VII, 42 U.S.C. §§ 2000e-2(a)(1) & -3(a), & -5(f)(1), as well as referenced provisions in Title VIII, 42 U.S.C. §§ 3602, 3604(a), 3613(a)(1)(A), are set forth in the Appendix to this Petition (App. 56a-60a).

STATEMENT OF THE CASE

Seven white male police officers filed an action alleging various civil rights violations by their employer, the City of

Richmond, and their supervisors. The district court held that the officers had failed to state Title VII "hostile environment" claims because the discriminatory actions undergirding such claims were directed at blacks and women, not the officers. A due process claim was dismissed for failure to state a claim, and a First Amendment claim was dismissed on the ground that the speech did not involve matters of public concern. Retaliation claims were dismissed for failure to exhaust administrative remedies, failure to state a claim, or failure to raise a genuine issue as to the motive behind the alleged discrimination.

The officers alleged that their immediate supervisor, Lt. Arthur Carroll, a while male, made a number of disparaging remarks to and about female and black members of the police force over a two-month period beginning in November 1993. Some of these comments were made in the presence of the black and female officers, while others were made only in the presence of the white officers.

The officers signed a letter to their precinct captain complaining of Lt. Carroll's profanity and outbursts of temper. Although the letter did not mention the specific disparaging remarks, one of the signatories orally conveyed the officers' concerns on that point when he delivered the letter. An investigation was conducted, but no action was taken against Lt. Carroll. The officers were, however, threatened with "adverse consequences" during the investigation.

During the following March and April, each of the officers filed a hostile-environment charge (race and sex) with the EEOC, and each received a right-to-sue letter. Thereafter, they allege that they were subjected to a series of retaliatory actions, including shift changes, transfers, and unfavorable performance evaluations. Each officer (except Quinney) then filed a second EEOC charge, this time claiming retaliation for their initial EEOC charge and related complaints about Carroll.

Again, each received a right-to-sue letter.

On August 11, 1995, the officers filed their complaint in the district court against the City and the Chief of Police in his official capacity. They sought relief under Title VII (42 U.S.C. §§ 2000e-2(a)(1) & -3(a)), § 1983, and state law. The officers contend that Lt. Carroll's remarks created both a sexually and racially hostile environment on the force that acted to destroy the necessary sense of "teamwork" between officers of different sexes and races, and that this resultant loss of teamwork raised the possibility that officers in one group might be reluctant to assist officers in another group during the performance of their duties on the streets. (See App. 63a, 64a-66a).

On November 21, 1995, the district court dismissed the hostile environment claims on the ground that Title VII created no such cause of action for persons (white males) complaining of discrimination and harassment directed at others (blacks and females). The court dismissed the § 1983 claims under Rule 12(b)(6) as well. To the extent that the officers relied on a theory that they were deprived of a property interest in "teamwork" without due process, the court found no support in the case law. As for the officers' theory that the retaliation violated their free-speech rights, the court held that the speech at issue (the letter to Captain Hicks) did not involve a matter of public concern.

After the officers filed an amended complaint that refined their retaliation claims, the court issued its final order on March 21, 1996. With regard to the officers' "opposition clause" claims - that the officers were retaliated against on the basis of their opposition to Lt. Carroll's discriminatory acts against the female officers - the court dismissed for lack of jurisdiction because such claims were not expressly included in

the officers' second EEOC charges and, therefore, the officers had failed to exhaust their administrative remedies. Quinney's opposition-clause claims were dismissed because he had failed to file an EEOC charge complaining of the retaliation.

The "participation clause" claims - that the officers were retaliated against for "participating in" an EEOC proceeding - were reevaluated and dismissed on alternative grounds. First, the claims were dismissed under Rule 12(b)(6) as "spurious" because the claims concerned "favorable treatment by the employer" and were thus outside even the seemingly absolute privilege of § 2000e-3(a). Second, characterizing the question as a close one, the court proceeded to consider the participation-clause claims under summary judgment standards and dismissed the claims because the officers had failed to create a genuine issue that the EEOC charge was in fact the proximate cause of the alleged retaliation by the City. (App. 28a-31a).

By opinion dated August 5, 1997, a unanimous three-judge panel of the Fourth Circuit Court of Appeals affirmed the district court's dismissal of the police officers' § 1983 claims. The panel reversed the district court on its dismissals of the Title VII hostile environment and retaliation claims, and remanded those claims to the district court for further proceedings (App. 43a). By majority vote of the active circuit judges, the panel decision was later vacated, and the appeal ordered to be reheard *en banc* (App. 45a). The Fourth Circuit sitting *en banc*, in a *per curiam* opinion affirmed the district court in its dismissal of the Title VII "hostile environment" claim and the "participation clause" and "opposition clause" retaliation claims by an equally divided vote on the *en banc* court (App. 47a). The *en banc* court affirmed the dismissal of the § 1983 First Amendment and procedural due process claims on the reasoning of the district court (App. 47a). The *en banc* court thus affirmed the district court's judgment in its entirety (App. 47a), but the *en banc* opinion gave no reasoning for its

affirmance of the district court except to state that affirmance of the district court's dismissal of the § 1983 claims was done so "on the reasoning of the district court." (App. 47a). Circuit Judge Luttig, joined by Judges Wilkins and Williams, wrote a concurring opinion to the *en banc per curiam* opinion affirming the district court's dismissal of the white male police officers' claims "that their white male superiors made disparaging comments about black and female co-workers, thus subjecting these co-workers to a hostile work environment in violation of Title VII." (App. 47a-48a).

In his concurring opinion, Judge Luttig recognizes the white male police officers' argument that they had satisfied Article III requirements for them to have standing under the Constitution to assert claims of hostile environment resulting from race and sex harassment directed by police department management against their fellow black and female police officers. Judge Luttig states in his concurring opinion, in this connection, that "(u)nder this interpretation, to be sure, the plaintiffs have stated a cause of action under Title VII because they allege that" (1) the police department had, through its discrimination, created a hostile work environment for blacks and women, and (2) the police officers suffered a cognizable Article III injury resulting from working in a racially or sexually polarized environment (App. 49a).

Although the three-judge panel decision of the Fourth Circuit had relied upon this Court's decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), for the panel's holding that "white men have standing to assert hostile environment claims under Title VII when the discriminatory conduct is directed at blacks or females" (App. 37a-38a), and concluded "that *Trafficante* compels this result" (App. 38a), Judge Luttig stated ". . . I read that case [*Trafficante*] to all but confirm" (App. 51a) his conclusion that the white male police officers did not have Title VII standing on their hostile

environment claims because of "the prudential rule against third-party standing." Under his reasoning, Judge Luttig concluded that the white male plaintiffs lacked Title VII standing because they had failed to assert their "own statutory rights" and instead were asserting that their fellow black and female police officers, not the seven white male police officers, were being discriminated against in their employment at the Richmond Police Department (App. 50a-51a). Judge Luttig reached this conclusion on the basis that Title VIII formally defines the term "aggrieved person", in 42 U.S.C. § 3602(i) under the general heading "Definitions", whereas in Title VII, which uses the term "aggrieved person" that term is not formally defined (App. 52a).

REASONS FOR GRANTING THE PETITION

I. The *En Banc Per Curiam* Decision Of The Equally Divided Fourth Circuit Court Of Appeals Affirming The Judgment Of The District Court In Its Entirety Directly Conflicts With The Decisions Of This Court And Other Courts Of Appeals. It Raises Critical Questions Concerning Prudential Limits On The Title VII Standing Of Plaintiffs Themselves Injured By Workplace Discrimination Directed At Their Fellow Employees.

Whether an individual has standing to pursue a claim in federal court is a two-pronged inquiry. Initially, a court must decide whether, as a constitutional matter, the case or controversy requirement of Article III of the Constitution has been met. An individual satisfies this requirement by pointing to an "injury in fact" that is likely to be redressed by a favorable decision from the court. *See, Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205,

211 (1972) (allegation of particular injury is necessary to prevent court from addressing only an abstract question). The second inquiry is grounded in prudential concerns about the exercise of federal court jurisdiction: a court must satisfy itself that "the interest of the plaintiff . . . [is] at least . . . `arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises." *Simon*, 426 U.S. at 39 n.19.

The question of Title VII standing cannot be answered by looking to the statutory section defining unlawful practices -- 42 U.S.C. § 2000e-2 (the prohibition section) -- but rather depends on the enforcement provision of Title VII -- 42 U.S.C. § 2000e-5. The latter provision allows suit by ". . . the person claiming to be aggrieved. . ." by prohibited discrimination. The key word here is "claiming". It *defines* the Title VII enforcement phrase to include not only the person who suffers the direct discrimination, but also a person who, too, is injured because of the discrimination, even though the latter person was not a direct target of the perpetrator of the discrimination. It is noteworthy that the title VIII enforcement provision in *Trafficante*, 42 U.S.C. § 3613(a)(1)(A) (App. 57a), uses the phrase "aggrieved person," and omits the word "claiming." However, Title VIII's definition, 42 U.S.C. § 3602(i), states (App. 58a): "`aggrieved person' includes any person who — (1) claims to have been injured by a discriminatory housing practice. . . ." The common thread linking Title VII and Title VIII as to standing is the use by Title VII of the word "claiming" in its enforcement section, and the use of the word "claims" by Title VIII in its definitions section. The distinction is one of form only, not of substance.

In this case, the seven white male police officers alleged an injury to *themselves* from the harassment. In their original complaint, they alleged that the harassment of their peers was

"totally destructive of the concept of teamwork." (JA 16)[1] Without this "concept of teamwork between and among police officers . . . officers will be needlessly exposed to additional dangers of life and limb." (JA 15). In the amended complaint, the officers elaborated on the injury they claimed the harassment caused. According to plaintiffs, "Carroll's biased statements . . . served to hostilely divide the officers on the basis of race and gender . . . to the detriment of [all officers'] personal safety and public welfare." (App. 63a, and see 64a-66a).

The district court characterized plaintiffs' harassment claims as based on a "right to be free of tensions caused by special treatment in their favor." (App. 7a). It is plain, however, that workplace comments denigrating women and blacks do not constitute special treatment in the white male police officers' favor. The district court also suggested that plaintiffs were "assert[ing] the rights of other persons." (App. 7a). To the contrary, the officers are not asserting the rights of their co-workers, but instead are asserting a right not to be injured *themselves* by the illegal harassment of their co-workers.

The injury alleged in this case — the increased risk to the male, white officers' safety that the harassment caused (App. 63a, and see 64a-66a) — surely is as great as, if not greater than, the loss of associational benefits alleged in *Trafficante*. Accordingly, plaintiffs have satisfied the requirements for standing under Article III, and so should be allowed to proceed with their Title VII action.

There is ample authority permitting an individual

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[1] JA = Joint Appendix in the record of the Fourth Circuit.

injured by the violation of another's civil rights to bring a claim based upon that violation. Under Title VII and relevant case law, individuals who suffer some injury as the result of employment discrimination against others have standing to bring a Title VII suit. Section 706(b) of Title VII provides that "any person claiming to be aggrieved" may file a charge with the EEOC challenging practices made unlawful by Title VII. 42 U.S.C. § 2000e-5(b). Section 706(f)(1) provides that, after obtaining a notice of right to sue, the "person claiming to be aggrieved" may commence a civil action. 42 U.S.C. § 2000e-5(f)(1). Courts consistently have interpreted the "person aggrieved" language as conferring standing upon anyone who can establish an injury sufficient to satisfy Article III's "case or controversy" requirement. Furthermore, courts regularly deem the Article III requirement met where injury is caused by the violation of another's civil rights.

The most notable case in this line of precedent is this Court's decision in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 208-09 (1972), where the Court held that a provision authorizing suit by any "person aggrieved" under Title VIII of the Civil Rights Act of 1968 permitted a white tenant of an apartment complex to bring suit challenging the complex's discrimination against blacks. *See*, 42 U.S.C. § 3610(a) ("person aggrieved" is "[a]ny person who claims to have been injured by a discriminatory housing practice"). The Court held that the white tenant's claim — that he was injured by housing discrimination against blacks because the exclusion of minorities from the apartment complex deprived him of "important benefits from interracial associations" — provided a sufficient injury in fact to confer standing under Article III. *Trafficante*, 409 U.S. at 210. The Court added that the statutory provision authorizing suit by "any person aggrieved" also supported the conclusion that the white tenant had standing.

Citing a Title VII case (*Hackett, infra*) holding that

Congress's use of the words "person aggrieved" "showed `a congressional intention to define standing as broadly as is permitted by Article III of the Constitution,'" the Court in *Trafficante* concluded that Title VIII reflected a similar intent. *Id.* at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971). *Cf. Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1278 (D.C. Cir. 1994) (Title VII is the type of statute that "confer[s] a cause of action upon everyone who meets the Article III requirement--that is, anyone `genuinely injured by conduct that violates *someone's* . . . rights' under the statute." Quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979)).

The Court also found support for its holding that the white tenant had standing in the "design of the Act" under which individuals function as "private attorneys general." *Trafficante*, 409 U.S. at 211. According to the Court, a "generous construction" of the Act's standing provision is consistent with this design and "give[s] vitality" to the Act. *Id.* at 212. Finally, the Court in *Trafficante* observed that its holding was supported by the relevant agency's "consistent administrative construction" of the statute, a construction "entitled to great weight." *Id.* at 210 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971) (Title VII case)).

Numerous courts of appeals to consider the question have held that *Trafficante*'s interpretation of the "person aggrieved" language applies with equal force to Title VII. Courts consistently have held that whites have standing under Title VII to challenge an employer's discrimination against blacks. *See, Stewart v. Hannon*, 675 F.2d 846, 850 (7th Cir. 1982) (white plaintiff has standing because "the exclusion of minority persons from a work environment can lead to the loss of important benefits from interracial associations"); *EEOC v. T.I.M.E.-D.C. Freight, Inc.*, 659 F.2d 690, 692 n.2 (5th Cir.

1981) (whites "may be 'persons aggrieved' by discrimination against blacks, provided that they can establish a personal injury"); *EEOC v. Mississippi College*, 626 F.2d 477, 483 (5th Cir. 1980) (white plaintiff "may charge a violation of her own personal right to work in an environment unaffected by racial discrimination"), *cert. denied* 453 U.S. 912 (1981); *EEOC v. Bailey Co.*, 563 F.2d 439, 452 (6th Cir. 1977) (definition of person aggrieved "includes a white person . . . who may have suffered from the loss of benefits from the lack of association with racial minorities at work"), *cert. denied*, 435 U.S. 915 (1978); *Waters v. Heublein, Inc.*, 547 F.2d 466, 470 (9th Cir. 1976) (white plaintiff "has standing to sue to redress racial and ethnic discrimination"), *cert. denied*, 433 U.S. 915 (1977); *cf. Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (Congress intended to grant standing to sue under Title VII to anyone meeting constitutional requirements); *Senter v. General Motors Corp.*, 532 F.2d 511, 517 (6th Cir.) (same), *cert. denied*, 429 U.S. 870 (1976); *BMC Marketing, supra*, 28 F.3d at 1277-78 (fair employment advocacy organization has a cause of action under Title VII if Article III's injury-in-fact requirement is met). The rationale of these cases would also permit a male plaintiff to challenge discrimination against women. *See, e.g., EEOC v. Beaver Gasoline Co.*, 584 F.2d 1263 (3d Cir. 1978) (vacating and remanding case where district court had held that male employee may not challenge discrimination against females because he is not "person aggrieved").

Courts have offered a number of different grounds for their conclusion that Title VII cases are "logically indistinguishable from *Trafficante*." *Waters*, 547 F.2d at 469. First, the aggrieved person language of Title VII and Title VIII is "strikingly similar." *Bailey Co.*, 563 F.2d at 452. Second, the design of the two statutes, particularly the important enforcement role both statutes give to individuals by empowering them to go to court to end discriminatory

practices, is "nearly identical." *Id.* At 453.[2] Third, courts have considered it significant that the Supreme Court in *Trafficante* cited with approval a Title VII case — *Hackett* — which held that Congress meant to define standing under Title VII as broadly as Article III would permit. *See also Bennett v. Spear*, 117 S.Ct. 1154, 1162-63 (1997) (citing *Trafficante*); *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 115 S.Ct. 1278, 1283 (1995) (person aggrieved phrase denotes standing in various statutes); *Innovative Health Systems v. City of White Plains*, 117 F.3d 37, 47 (2d Cir. 1997) (citing *Trafficante* and stating that enforcement provisions of the statute determine standing). *See Bailey Co.*, 563 F.2d at 453.

Fourth, the general purposes of Title VII and Title III are the same — outlawing discrimination; the fact that one applies to employment and the other to housing does not warrant a difference in the requirements for standing. *Id.* At 453-54; *cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (Congress indicated that policy against discrimination in the workplace is "to be of the `highest priority'").

Finally, courts have stressed that, as in *Trafficante*, the agency responsible for interpreting the statute has consistently interpreted Title VII to permit whites to challenge discrimination against blacks in their workplace. *See* EEOC Case YSF 9-108 (June 26, 1969), 1973 EEOC Dec. [CCH] ¶ 6030; EEOC Dec. 70-09 (July 8, 1969), 1973 EEOC Dec.

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[2] Unlike Title VII, Title VII empowers the administering agency (the EEOC) to bring suits to enforce the statute. However, as courts have pointed out, this enforcement authority was added by 1972 amendments to the 1964 Act. The amendments were intended to increase compliance with the Act, not to narrow the class of individuals who could bring complaints. *See, Bailey Co.*, 563 F.2d at 453; *Waters*, 547 F.2d at 470.

[CCH] ¶ 6026; EEOC Dec. 71-969 (Dec. 24, 1970), 1973 EEOC Dec. [CCH] ¶ 6193. For all these reasons, the seven white, male police officers have standing under Title VII to challenge racial and sexual discrimination against their black and female co-workers, because they have alleged injury to *themselves* from that discrimination. Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986), cited and quoted in *Oncale v. Sundowner Offshore Services, Incorporated*, 118 S.Ct. 998, 66 LW 4172 (1998).

II. The *En Banc Per Curiam* Decision of the Fourth Circuit Court Of Appeals Affirming The District Court's Dismissal Of All Retaliation Claims Conflicts With The Decisions Of This Court And Courts Of Appeals. It Raises Critical Questions Concerning The Underlying Policy Of Title VII's Prohibition Against Employer Retaliation Against Employees For Utilizing EEOC Processes, And For Opposing Employment Practices Made Unlawful By Title VII.

Section 704(a), Title VII's anti-retaliation provision, has two prongs. The so-called participation clause prohibits retaliation against an individual "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [title VII]." 42 U.S.C. § 2000e-3(a). The opposition clause prohibits retaliation against an individual "because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). (App. 59a). The police officers alleged that they were subject to retaliation both for participating in proceedings under Title VII by filing charges with the EEOC, and for opposing unlawful harassment of their co-workers by

complaining within the police department. The district court acknowledged there was evidence (App. 23a) that the City in fact retaliated against the plaintiffs, but the court nevertheless dismissed plaintiffs' claims of retaliation based on both the participation clause and the opposition clause. The police officers' retaliation claims are valid under both clauses.

A. Title VII Prohibits an Employer From Retaliating Against an Employee for Filing an EEOC Charge Alleging a Title VII Violation Whether or Not the Charge Actually States a Claim Cognizable Under Title VII.

By its terms, § 704(a) prohibits retaliation against an individual because he or she has "made a charge . . . under [Title VII]." 42 U.S.C. § 2000e-3(a). This protection is not limited or conditioned in any way once a charge is filed under Title VII. The provision consistently has been interpreted to prohibit absolutely any retaliation against an individual for submitting a charge to the EEOC alleging a violation of Title VII, regardless of the validity or reasonableness of the charge. *See*, *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980) ("[t]he merits of a charge made against an employer is irrelevant to its protected status"), *cert. denied*, 450 U.S. 979 (1981); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (protection under participation clause "is not lost if the employee is wrong on the merits of the charge . . . nor is protection lost if the contents of the charge are malicious and defamatory as well as wrong"); *Abramson v. University of Hawaii*, 594 F.2d 202, 211 (9th Cir. 1979) (participation clause "does not sanction retaliation against those whose use [of Title VII] is unwarranted"); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969) (same); *Blizzard v. Newport News Redevelopment & Housing Auth.*, 670 F.Supp. 1337, 1344 (E.D. Va. 1984) (same).

This reading of § 704(a) is the most natural interpretation of the participation clause. Thus any person who submits a charge to the EEOC alleging a violation of Title VII has "made a charge . . . under [Title VII]," 42 U.S.C. § 2000e-3(a), just as any person who files a complaint in court alleging a violation of Title VII has filed suit under Title VII, even if the court eventually determines that the complaint fails to state a claim under the statute. *Cf. Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988) (Title VII's participation clause affords no protection to an individual who suffered retaliation after filing insurance and disability claims under state law, not under Title VII), *cert. denied*, 489 U.S. 1079 (1989)

By contrast, the opposition clause prohibits retaliation for opposing "practices *made unlawful* under [Title VII]." 42 U.S.C. § 2000e-3(a) (emphasis added). This language imposes a higher standard: an individual is protected for opposing practices only if he or she has a reasonable belief that such practices violate Title VII. *See, e.g., Crowley v. Prince George's County*, 890 F.2d 683, 687 (4th Cir. 1989) (plaintiff fails to state a claim under the opposition clause when he alleges that he was retaliated against for opposing racial harassment by police officers not in the workplace, but against members of the community).

Although the district court purported to recognize that Title VII absolutely prohibits retaliation for filing a Title VII charge regardless of the charge's merits, the court held that the plaintiffs were not protected from retaliation for filing the charges at issue in this case because, under the court's "sense of reason," there is no absolute protection for charge filing where the charge is "a statement of favorable treatment [for the white male police officers] by the employer." (App. 21a-22a). Such a standard is inconsistent with the plain language of § 704(a), and frustrates Congress' intent to provide strong protection to persons who file charges or otherwise cooperate with the EEOC

in its efforts to enforce Title VII. In *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992), this Court states: "We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."

Title VII's enforcement scheme depends on charges filed by private individuals who, like plaintiffs in this action, often are still employed by the employer charged with discrimination. Such individuals are vulnerable to retribution by employers displeased at being made to answer for their employment practices. Unless persons who file charges can be assured that they have protection against employer retaliation, the EEOC's source of information about potentially unlawful practices will dry up. *See, Holt v. Continental Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983) (retaliatory discharge may deter other employees from protecting their own rights or testifying about discrimination to others), *cert. denied*, 465 U.S. 1030, 1038 (1984); *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986) (retaliation "is likely to cause irreparable harm to the public interest in enforcing the law by deterring others from filing charges"); *EEOC v. Board of Governors of State Colleges & Univs.*, 957 F.2d 424, 431 (7th Cir.) (protection of individuals who cooperate with EEOC important component to EEOC enforcement of Act), *cert. denied*, 506 U.S. 906 (1992). Accordingly, Congress provided persons who file charges strong protection from employer retaliation.

A holding that an employer is prohibited from retaliating against an individual for filing a Title VII charge only if the charge is subsequently held to state a claim cognizable under Title VII would seriously undermine the protection Congress provided. Anything less than absolute protection for persons who file charges alleging Title VII

violations would give individuals grounds to fear that they could be subjected to retaliation for filing a charge if their employer deems the charge meritless, and that they could be without legal recourse if a court likewise deems them meritless. (App. 61a-62a). As one commentator has observed, such a scenario would frustrate "the central purpose of the participation clause, [which] is to permit employees to pursue, without fear of retaliation, the statutory procedural mechanisms designed for vindication of their rights." 2 Lex K. Larson, *Employment Discrimination*, § 34.03[2] (1966). An absolute prohibition on retaliation against persons for participating in Title VII proceedings is the most effective deterrent to employer retribution against an individual who has filed a Title VII charge. Under this standard, an "employer may not take it on itself to determine the correctness" of a charge. *Pettway*, 411 F.2d at 1007. Instead, "administrative and judicial mechanisms determine the truth, falsity, frivolousness or maliciousness of an EEOC charge." *Womack*, 619 F.2d at 1298.

The district court held, in the alternative, that even if the EEOC charges did merit protection from retaliation, the police officers' claim that they were subject to retaliation for filing EEOC charges could not survive a motion for summary judgment because there is no evidence that they suffered retaliation for filing EEOC charges. The record in the Fourth Circuit Court of Appeals shows otherwise. (*See, e.g.*, App. 61a-62a).

B. The Police Officers May Pursue Retaliation Claims Based on Opposition to the Unlawful Practices, Where Their Retaliation Charges Alleged Retaliation for Filing EEOC Charges Challenging the Same Unlawful Practices.

The police officers also alleged that they suffered

retaliation for opposing practices made unlawful by Title VII. Although the district court acknowledged that there was evidence that plaintiffs were subjected to adverse employment actions for protesting racial and sexual harassment of co-employees (App. 23a), the court held that they could not bring suit on those claims because their retaliation charges mentioned only retaliation for filing Title VII charges, even though the EEOC charges they filed challenged the same racial and sexual harassment. The district court's holding, affirmed in its entirety by the Fourth Circuit (App. 47a), is based on an overly rigid standard of specificity on the officers' retaliation charges. Under the proper standard, the officers should be allowed to maintain their opposition clause claims because it is clear that their allegations of retaliation for opposition to unlawful practices fell within the scope of the allegations contained in their EEOC charges.

The district court's conclusion that their charges could not support their opposition clause retaliation claims is based on an erroneous view of the purpose of a Title VII charge and the nature of EEOC proceedings (App. 20a). A Title VII charge "is not the equivalent of a complaint initiating a lawsuit." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). Rather, it is a document, usually filed by a layperson, that "function[s] . . . to place the EEOC on notice that someone . . . believes that an employer has violated [Title VII]." *Shell Oil Co.*, 466 U.S. at 68. The charge thus triggers informal proceedings designed to attempt to resolve complaints of employment discrimination voluntarily. *See, e.g., Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970); *see also, General Elec. Co.*, 532 F.2d at 364 (charge is "'a starting point' for a reasonable investigation by the Commission").

Accordingly, it is well-established that "the scope of a Title VII lawsuit may extend to any kind of discrimination like or related to allegations contained in the charge." *Nealon v.*

Stone, 958 F.2d 584, 590 (4th Cir. 1992) (quotations omitted) (holding that individuals need not file separate retaliation charge in order to bring a retaliation action in court); *see also Hill v. Western Elec. Co.*, 672 F.2d 381, 390 n.6 (4th Cir.), *cert. denied*, 459 U.S. 981 (1982); *General Elec. Co.*, 532 F.2d at 369. As the Fourth Circuit panel decision (vacated by the subsequent *en banc* decision) correctly notes (App. 41a), a plaintiff may challenge in court discriminatory acts that were not specifically alleged in the EEOC charge if they are "like or related to allegations contained in the [EEOC] charge" (App. 41a).

The EEOC's investigative files accompanying the officers' initial EEOC charges[3] are replete with references to retaliation suffered for opposing the race and sex harassment of fellow black and female police officers. (*See* JA 110, Childress Aff.)[4] (Childress threatened with expulsion from Fraternal Order of Police because he signed letter of complaint); (JA 118, Mease Response to EEOC Questionnaire) (Mease "singled out for unfair . . . treatment because [he] signed letter" regarding Lt. Carroll); (JA 136, Harvey Aff.) (Lt. Carroll has "retaliat[ed] against those of us who have dared to report his conduct and actions"); (JA 141, same); (JA 140, Harvey Aff.) (four patrolmen reported that since the time the letter was delivered, Lt. Carroll was "berating and belittling them"); (JA 156, Thompson Aff.) ("Since the letter was presented to the Captain . . . it is as if [Lt. Carroll] wants to retaliate against us."); (JA 163, Noyes Aff.) (statement made by Lt. Carroll in March "was

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[3] Officer Quinney did not file a second charge. The Fourth Circuit's vacated panel opinion correctly concluded he could still pursue a retaliation claim (App. 31a, n.1).

[4] "JA" = the Joint Appendix in the record of the Fourth Circuit.

a subtle retaliatory attack"); (JA 173, Stachura Aff.) (after complaints were presented to the police department, Lt. Carroll "has retaliated by removing me from . . . my regular unit"). This evidence in the EEOC's investigative files indicates that plaintiffs' opposition claims were, in fact, within the scope of the EEOC's investigation that followed the charges of discrimination.

The district court erred in dismissing the opposition claims, as did the *en banc* Fourth Circuit in affirming the district court. As stated in the unanimous decision of this Court in *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 849, 136 L.Ed.2d 808, 816 (1997), there is ". . . a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms."

CONCLUSION

This case presents important Title VII issues in which the Fourth Circuit Court of Appeals is in conflict with several other circuits, as well as applicable decisions of this Court. As the law in the Fourth Circuit now stands, white male plaintiffs do not have standing under Title VII to assert hostile environment claims for injury to themselves resulting from employment discrimination directed at their fellow black and female police officers. The law in the Fourth Circuit, which by a divided *en banc* court affirmed the judgment of the district court in its entirety, is that because of the general rule of prudential limitation on standing, there is no cause of action under Title VII for the white male police officers even though they have satisfied the Article III constitutional injury-in-fact requirement. This is a critical issue to be resolved by this Court because of its utmost importance under the most important of employment laws, Title VII.

Similarly, the law in the Fourth Circuit, since the district

court's judgment has been affirmed in its entirety, is that there is no Title VII protection against employer retaliation against an employee for filing an EEOC charge, unless the employee's charge has merit or is reasonable. Further, under the rule of law now established by the equally divided Fourth Circuit's full affirmance of the district court, the filing of charges with the EEOC now assumes the stringency of common law pleadings. That is, the law in the Fourth Circuit is that unless the charge sets forth *all* detailed specifics thereof, there is no relief available under the EEOC processes regardless of whether the omitted specifics fall within the scope of the EEOC's reasonable investigation.

These rules of law in the Fourth Circuit are foreign to the spirit, language, and intent of Title VII, are contrary to the rules of law in several other circuits, and contravene the policies of Title VII enunciated by this Court in several cases, including two of its most recent, *Oncale v. Sundowner Offshore Services, Incorporated*, 118 S.Ct. 998, 66 LW 4172 (1998), and *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 849, 136 L.Ed.2d 808, 816 (1997).

Respectfully submitted,

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April 15, 1998

APPENDIX

APPENDIX A

[Filed November 21, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:95-662

DAVID W. CHILDRESS, et al.,

Plaintiffs,

v.

CITY OF RICHMOND, VIRGINIA et al.,

Defendants.

By: Richard L. Williams, Senior Judge
United States District Court

MEMORANDUM OPINION

This matter is before the Court on the defendants' Motion to Dismiss And/Or for Summary Judgment. This case presents the question of whether a white or male worker can state a civil rights claim for a supervisor's hostility to blacks or women. Because the most logical interpretation of the law argues against such a claim, the white male officers are dismissed from this case and the female officers may continue only their sex-discrimination claims. The plaintiffs' remaining claims are dismissed for the reasons stated below, and Chief of Police Jerry Oliver remains as a proper defendant because the Court finds he has been sued in his individual capacity.

I.

Seven white male and two white female police officers filed suit against the City of Richmond and its Chief of Police, Jerry Oliver. Plaintiffs ("the officers") allege the existence of a racially and sexually hostile work environment in violation of Title VII and §§ 1981 & 1983, intentional discrimination in violation of those sections, retaliation and violation of the public policy of the Commonwealth of Virginia. In addition, in their response to the City's motion, the officers raise a First Amendment claim based on their right to criticize the operation of the government. The officers are members of Platoon A, Second Precinct, in the City of Richmond.

The officers allege that their immediate supervisor, Lt. Arthur T. Carroll, a white male, has created a hostile environment by a variety of race- and sex-biased comments. In November or December 1993, they allege that Carroll said to three female officers "Well, I see all my bitches are here, it must not be that time of the month." On December 16, 1993, they allege that Carroll noted with obvious approval that an all-white, all-male roll call of officers was "like it used to be." On January 3, 1994, they allege that Carroll called female officers as his "pussy posse" and "vaginal vigilantes" in the presence of both male and female officers. Early in 1994, they allege that one of the officer's wives called Carroll and then heard him say in the background that a black female officer was a "mother-fucking worthless black bitch," a "no good black bitch" and a "most useless nigger." They also allege Carroll to be emotionally out of control, extremely verbally abusive and given to alarming outbursts of temper and profanity.

In response to this situation, on January 20, 1994, [5] the officers presented a complaint letter to Captain Frederick Hicks, Officer-in-Charge of the Second Precinct. The letter did not mention the above-listed specific incidents, and did not mention race, sex or hostile environment by name, but instead questioned Lt. Carroll's mental stability and recommended that the Department give him an independent psychiatric exam. Sixteen officers signed the letter, including all of the plaintiffs. After receiving the complaint letter, Capt. Hicks showed it to Lt. Carroll.

The officers allege that word of the letter reached Lieutenant Wayne Johnson, the officer in charge of Platoon B. He took the allegedly unprecedented step of calling in the signatories, pulling them away from their police duties (which have not been specified) and thereby endangering the public. Johnson advised the officers to retract the letter and intimated that failure to do so could harm their jobs. They refused. Capt. Hicks conducted an investigation and apparently never took action against Lt. Carroll, but the officers allege that Capt. Hicks harassed and threatened them during their investigation. The officers allege that thereafter they were subjected to adverse treatment (see ¶ 16-26 of the Complaint) including transfers and negative evaluations.

The officers base their theory of hostile environment on the need for "teamwork" as a "vital and indispensable working condition," without which police officers and the public will be endangered. They allege that Lt. Carroll's comments and attitudes have created a chilling effect and a destruction of teamwork between officers of different races and sexes. They

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[5] The letter is dated January 13, 1995, but was presented to Hicks on January 20.

also allege that the police department's "chain of command" policy makes it a "cardinal sin" to criticize a supervisor. This policy, they allege, deprived them of the fulfillment of the teamwork concept, a vital and necessary term and condition of their employment contracts. They allege that their adverse evaluations cited failure to follow the chain of command.

II.

1982. Standard for motions to dismiss and for summary judgment in a case involving a municipality.

As a preliminary matter, the Court notes that the normal standard for review of motions apply to this case. The federal courts follow notice pleading, not fact pleading. Fed. R.Civ. P. 8(a)(2). Municipalities do not have the benefit of requiring a more stringent "heightened pleading" standard in cases under § 1983. Notice pleading applies equally to claims against cities and private parties. Leatherman v. Tarrant County, 122 L.Ed.2d 517, 526 (1993).

1983. Title VII and § 1981 claims.

a. Lack of Jurisdiction.

The City moves to dismiss plaintiffs Stachura, Childress and Quinney under Fed. R. Civ. P. 12(b)(1) on the basis that those plaintiffs have not received a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"). This requirement is indeed jurisdictional. Plaintiffs concede that Quinney did not timely file and must be dismissed; however, the officers' brief includes copies of EEOC right-to-sue letters to Stachura and Childress, so it appears that jurisdiction is proper as to them.

b. Gender Claims.

The City's Motion argues that the complaint does not allege sufficient numbers of sexually hostile incidents, essentially demanding fact pleading. The more interesting issue is whether a male can state a claim for discrimination against female co-workers. Generally, there is no right to assert the civil rights of another person; to state a civil rights claim for which relief can be granted, one must allege that he, himself, suffered deprivation of a right, privilege or immunity secured to him by the Constitution or federal laws. See, Inmates v. Owens, 561 F.2d 560, 561 (4th Cir. 1977).

With respect to the hostile environment claims, the Court's research, and that of the parties, discloses no direct precedent for the instant case. Same-sex harassment cases provide useful persuasive authority. The Fourth Circuit has not yet decided the same-sex issue, but the prevailing view is that Title VII addresses only discrimination between the sexes. See, Garcia v. Elf Atochem North America, 28 F.3d 446, 452 (5th Cir. 1994); Benekritis v. Johnson, 882 F.Supp. 521, 525 (D.S.C. 1995). Three district courts in the Fourth Circuit, including one in the Eastern District of Virginia, have held that same-sex harassment does not constitute a Title VII or a § 1981 claim. See, Mayo v. Kiwest Corp., 898 F.Supp. 335, ---, 1995 WL 558570 (E.D.Va. August 8, 1995) (holding that courts interpret Harris v. Forklift Systems, Inc., 126 L.Ed.2d 295 (1993), to prohibit same-sex claims because same-sex does not amount to discrimination "because of" the plaintiff's gender). The one appellate court to address the issue dismissed the claim. See Garcia, 28 F.3d 446. Only a single district court in the Fourth Circuit, also in the Eastern District of Virginia, has recognized a same-sex hostile environment claim. Ecklund v. Fruisz Technology, Ltd., --- F.Supp. ---, 1995 WL 662391 (E.D. Va. November 7, 1995). One pattern, at least, is clear: for same-sex harassment to support a claim, there must be an allegation of

quid pro quo, at the very least, some sexual element to the harassment or hostile environment.

With respect to intentional discrimination claims, a plaintiff may prove indirect evidence of discrimination by showing: (1) his membership in a protected claim; (2) that he was qualified; (3) that despite his qualifications he suffered adverse employment action; and (4) that after the adverse action, the job remains open to persons with the plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Addressing the intentional discrimination claims first, this Court holds that the male officers have failed to state a claim. The term "protected class" is clearly meant to limit the potential class of plaintiffs. If "protected class" is to have any definition other than "all of humanity," it must mean a class which is defined against, and protected with respect to, the alleged discriminator. Where as here a male supervisor is of the same sex as the male plaintiffs, and is actually alleged to be biased in their favor, those male plaintiffs cannot be said to be within a protected class with respect to the supervisor. The male officers in this case are not in a protected class and thus fail the first prong of the McDonnell Douglas test.

Addressing the hostile environment claim, the Court holds that Title VII permits no claim for hostile environment based on same-sex harassment where there is neither an allegation of quid pro quo nor some sexual component of the harassing behavior.[6] Therefore by analogy to same-sex harassment, and under a general understanding of Title VII, the

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[6] The Court expresses no opinion on the validity of a quid pro quo same sex harassment claim, as that issue is not before it.

male officers' gender discrimination claims should be dismissed. To the extent that the male officers attempt to assert the rights of other persons, female officers, they clearly state no claim. To the extent they assert a general Title VII right to be free of tensions caused by special treatment in their favor, the male officer's complaints should be dismissed because they attempt to create a new Title VII right out of whole cloth. Any way their complaints are viewed, the male officers are attempting to recover for violations of other people's civil rights, which they have no standing to do. It should be noted that the male officers do not allege that the lack of "teamwork" rises to the level of having women create a hostile working environment against them - rather, the hostility alleged is the hostility of the supervisor toward their compatriots.

The female officers' sex-based claims do not suffer the defects of the male officers' claims; under notice pleading, they have stated a claim for hostile environment. The female officers' claims should also survive the motion for summary judgment because they state a claim and the Complaint raises genuine issues of material fact. The City's Motion does not furnish even a single affidavit to contradict the allegations that Lt. Carroll made inflammatory statements or created a hostile environment.

The City does not make the arguments above; instead, it argues that all the claims should be dismissed for failure to plead sufficient facts. That argument fails because of the Federal Rules' preference for notice pleading. See Leatherman, 122 L.Ed.2d at 526.

c. Race claims.

Claims for racially and sexually hostile environments are held to the same standards by Fourth Circuit decisions. See Dennis v. County of Fairfax, 55 F.3d 151, 155 (4th Cir. 1995);

Carter v. Ball, 33 F.3d 450, 461 (4th Cir. 1994). All nine officers are white, as is the supervisor whose conduct they complain of. Therefore the race-based claim of all of the officers suffers from the same defects as the male officers' gender claim. At its heart, the officers' Title VII claim either attempts to assert the civil rights of others or alleged that they were discriminated against by being provided disparate and better treatment than their black peers. Neither allegation states a claim. Again, the officers do not allege that their black co-workers have created a hostile work environment against them; rather, the "hostility" in the work environment comes from the white supervisor and resulting reductions in "teamwork," a separate § 1983 claim discussed below. The Court holds that the civil rights laws permit no claim for same-race discrimination where the only allegation is that a supervisor is biased in the plaintiffs' favor.

d. Retaliation.

A plaintiff can establish a valid retaliation claim without a valid claim for the discrimination itself. However, the plaintiff must believe in the validity of the claim, and that belief must be reasonable. Mayo, 898 F.Supp. At ---. In determining reasonableness of belief, a court must look to pre-existing case law. Id. In the context of a same-sex complaint, Mayo found that reasonableness did not exist and thus same-sex retaliation did not state a claim. Id.

The female officers' claims for sexually hostile environment and intentional discrimination do state a claim and are sufficient to survive a motion to dismiss. As the claims are valid, the retaliation charge is also properly stated and should survive the City's Motion.

The male officers' gender claims, and the race claims of all of the officers, cannot be reasonably expected to state a

claim and therefore the male officers' retaliation claims must be dismissed.

1984. Section 1983: motion to dismiss.

a. Claims via rights guaranteed by § 1981.

A plaintiff cannot separately state a claim against a municipality under § 1981. When suit is brought against a state actor, § 1983 is the exclusive remedy for federally guaranteed rights. Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995). A plaintiff must show that the discrimination is part of an official custom or policy. Id.

The § 1981 claims should be dismissed for failure to show racial discrimination, as explained above.

b. Other § 1983 claims.

The Complaint itself, in Count II, ¶¶ 29 & 30, only alleges that the City "discriminated against" the officers in violation of "§§ 1981 and 1983." The complaint does not allege on what basis the discrimination occurred - race, protected speech or any other ground - but the City has not moved for a more definite statement. By their response and oral argument to the City's motion, the officers appear ready to make a number of § 1983 claims independent of § 1981.

i. Property right in teamwork in a paramilitary organization.

The officers allege in their brief that there is a property right in the teamwork of a paramilitary organization, of which the police force is one, and that deprivation of that property right without a hearing is a violation of due process. The officers do not cite any case law for this proposition, but may

intend to make an argument under cases such as Egger v. Phillips. 710 F.2d 292 (7th Cir. 1983). In that case, an appeals court mentioned that a trial court had judicially noted that teamwork was of "primary importance" in the FMI as a paramilitary organization. Id. at 295. "Teamwork" in this context, however, was not cited as a property right but as a justification for great judicial deference to governmental decisions where teamwork and discipline are needed; that is, "teamwork" cases actually argue against the officers' position.

The concept of teamwork as a property interest is not illogical, but it does not have direct support in the case law. The concept is used instead in conjunction with valid race and gender claims; since most of the officers' race and gender claims are not valid, they cannot circumvent the limitations on § 1981 or Title VII by the use of "teamwork."

ii. Freedom of speech.

Although the complaint does not mention First Amendment rights, the officers' brief raises the issue. To prevail, a public employee has the initial burden to prove that the allegedly protected speech (1) involved a matter of public concern and that his interest in commenting upon it outweighed the employer's interests in efficient operations, and (2) the speech constituted a "substantial" or "motivating factor" in the adverse employment decision. Hughes v. Bedsole, 48 F.3d 1376, 1385 (4th Cir. 1995). Rather than attempting to define "public concern," the Fourth Circuit takes the approach of requiring that a plaintiff demonstrate that he was speaking as a citizen on matters of public concern, rather than as an employee on matters peculiar to his employment. See DiMeglio v. Haines, 45 F.3d 790, 805 (4th Cir. 1995). Even if the employee is speaking as a private citizen, protection depends on a balance between his interest and governmental efficiency. See Id.

The speech at issue in this case, the letter against Lt. Carroll, was clearly "spoken" by employees. The officers wrote the letter in their capacity as police officers, employees, about a condition of their employment. The officers took issue with his temper and his style. They paid lip service to lack of teamwork and the resulting potential for decreases in public safety, but the officers' real concerns were intramural concerns, concerns about matters peculiar to their employment. The officers have not stated a claim for violation of their free-speech rights, and any free speech claim must therefore be dismissed.

1985. Public policy.

Virginia strongly adheres to the at-will employment doctrine, with a narrow exception for violations of public policy. See Lockhart v. Commonwealth Educ. Systems Corp., 439 S.E.2d 328, 330 (Va. 1994). The exception is limited to policy as embodied by state statutes, not federal ones. White v. Federal Exp. Corp., 729 F.Supp. 1536, 1550 (E.D.Va. 1990). The exception is also limited to public, not private rights. Miller v. SEVAMP, 362 S.E.2d 915, 918 (Va. 1987); Flinders v. Datasec Corp., 742 F.Supp. 929 (E.D.Va. 1990).

A state statute against race and gender discrimination does exist: "unlawful discrimination because of race [or] sex" was made a violation of public policy by the Virginia Human Rights Act, Va. Code Ann. § 2.1-725, so there does now appear to be a common-law cause of action for race- or sex-based job discrimination. However, this right does not appear to add to the substantive provisions of federal law. More importantly, the officers have not identified this statute as the one on which they base their public policy claim.

The officers did specify in their Complaint what public policy of Virginia they intend to sue upon. In paragraphs 3(a-c) of their Complaint, they refer to public policy as set out in Va.

Code Ann. §§ 15.1-137 & -138, but these sections merely set out the general powers of a municipality to create a police force. The sections do not require a municipality to act, and therefore do not create any public rights. There is no public policy right of action for the enforcement of non-public rights, and thus the officers have stated no public policy claim.

1986. The claim against Chief of Police Jerry Oliver.

The City moves to dismiss Count IV of the Complaint, which appears to allege that Oliver and his predecessor, Marty M. Tapscott, have been sued in their personal capacities and are personally liable. The City claims that Oliver is sued only in his official capacity, as a figurehead, and should be dismissed as a defendant.

When a complaint does not allege capacity specifically, the court must determine capacity. Biggs v. Meadows, 66 F.3d 56, 61 (4th Cir. 1995). There is no bright line test. The allegation that the official was acting according to an official custom or policy tends to argue for official capacity; the allegation that the official violated that policy argues the reverse. See Id. A request for compensatory damages tends to argue for personal capacity, as such relief is unavailable in official capacity suits. Id.

When an official is sued in his personal capacity, it is not enough to show that subordinates of the sued official were the actors; the doctrine of respondent superior has no application to § 1983 cases. McDonald v. Dunning, 760 F.Supp. 1156, 1160 (E.D.Va. 1991). A personal capacity suit cannot succeed absent proof of some degree of personal involvement in the alleged deprivation of rights. Id. In addition, a plaintiff must prove the official's actions proximately caused his damages. Amato v. City of Richmond, 875 F.Supp. 1124, 1133 (E.D. Va. 1994).

The officers are suing Oliver in his personal capacity. While they do allege at some points that the police department used an official police department policy - the "chain of command" - to discriminate against them, they more often argue that their mistreatment violated state policy, such as "teamwork" or "community policing." More importantly, they are suing for monetary damages, a demand which indicates a personal capacity suit.

The remaining question is whether the officers have alleged personal involvement. The answer for notice pleading purposes is that they have, if inartfully. Paragraph 33(a) of the complaint alleges that Oliver actually knew about and, essentially, actively refused to control Carroll's behavior. For purposes of a motion to dismiss or for summary judgment, especially without affidavits from the City, their allegation is sufficient to survive and proceed to trial.

1987. Punitive damages.

The parties agree that the officers' demand for punitive damages was in error and should be dismissed.

III.

By consent of the parties, the demand for punitive damages is dismissed and plaintiff Daniel Quinney is dismissed for failure to timely file a Title VII retaliation charge. With respect to Count I, violations of Title VII, the Motion to Dismiss is granted as to the six remaining male plaintiffs for failure to state a claim pursuant to Rule 12(b)(6), and denied as to the two female officers. On Count II, §§ 1981 and 1983, the motion to dismiss is granted as to the claims for free speech and for due process violations of property rights as well as to the charge literally stated, race discrimination. On Count III, violation of the public policy of the Commonwealth of

Virginia, the motion to dismiss is granted for failure to state a public right for which relief may be granted. On Count IV, the claim for damages against Tapscott and Oliver, the City's motion is denied because the claim will be construed as one stated in the officials' personal capacities. In summary, only the two female plaintiffs, Virginia M. Downey and Janice M. Thompson, should remain as plaintiffs in this suit, and they should proceed only three theories: intentional gender discrimination, sexually hostile work environment and retaliation, all in violation of Title VII.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

/s/ Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

Nov 21 1995

APPENDIX B

[Filed November 21, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

C.A. No. 3:95-662

DAVID W. CHILDRESS, et al.,

Plaintiffs,

v.

CITY OF RICHMOND, VIRGINIA et al.,

Defendants.

By: Richard L. Williams, Senior Judge
United States District Court

ORDER

This matter is before the Court on defendants' Motion to Dismiss And/Or for Summary Judgment. For the reasons stated in the accompanying Memorandum Opinion, defendants' Motion is GRANTED IN PART, in the following manner. The claims of the seven male plaintiffs are dismissed for failure to state a claim for which relief may be granted under Fed. R. Civ. P. 12(b)(6). The female plaintiffs' claims for racial discrimination in violation of Title VII, 42 U.S.C. §§ 2000e-1000e-9, violations of 42 U.S.C. §§ 1981 & 1983, and violations of Virginia public policy are also dismissed pursuant to Rule 12(b)(6). As to the Title VII sexual discrimination and retaliation claims of the two female plaintiffs, Virginia M.

Downey and Janice M. Thompson, the defendants' Motion is DENIED. The Court construes the complaint as stated against defendants Marty Tapscott and Jerry Oliver in their personal capacities, and therefore the motion to dismiss Tapscott and Oliver as parties defendant is also DENIED.

Let the Clerk send a copy of this Order to all counsel of record

/S/ Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE
Nov 21 1995

APPENDIX C

[Filed March 21, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 3:95CV662

DAVID W. CHILDRESS, et al.,

Plaintiffs,

v.

CITY OF RICHMOND, VIRGINIA et al.,

Defendants.

By: Richard L. Williams, Senior Judge
United States District Court

MEMORANDUM OPINION

This matter is before the Court on the defendants' Motion for Summary Judgment. By its Memorandum Opinion and Order of Nov. 21, 1995, the Court dismissed the seven white male plaintiffs completely under 12(b)(6) and also dismissed the two white females' state common law claims and claims for race discrimination under Title VII, 42 U.S.C. §§ 1981 and 1983 and Virginia public policy. The Court also construed the claim stated against Chief Oliver and former chief Tapscott to be in their personal capacities. The Court on December 12, 1995 then permitted the plaintiffs to amend their complaint. The amended complaint formally added Tapscott as a defendant. Most importantly,

the amended complaint now alleges that the male plaintiffs were retaliated against not only for their own discrimination claims but also for their assistance to the female officer's claims. The complaint also realleges all the claims which were previously dismissed.

The Court orally advised the parties of its holding on this second motion by telephone on March 15, so that the parties could proceed to trial. The parties then settled the claims of the two female officers. This opinion gives the reasons and holding of the Court's March 15 decision.

I. Facts.

The facts of the case were stated in the Court's earlier memorandum, but some additional facts about the EEOC charge-filing stage of the case are necessary. At the outset the Court notes that plaintiff Quinney, a white male, must be dismissed as the plaintiffs concede that he did not timely file. As to the remaining eight officers, all filed an initial charge stating simply that, since November 1, 1993, each had been discriminated against because of his or her race and sex. All eight then filed a second charge between July and September, 1994, alleging retaliation. However, only one officer, the female plaintiff Janice Thompson, alleged that the retaliation was both for filing her earlier claim and for "opposing employment practices unlawful under Title VII." The remaining 6 male officers, and the other female Downey, merely stated charges to the effect of "I believe [some action] was in retaliation for the filing of my first EEOC charge in violation of Section 704(a)[1] of Title VII."

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[1] Codified as 42 U.S.C. 2000e-3(a).

II. Analysis.

1. Law of the case.

Most of the realleged claims in the amended complaint were subject to the Court's earlier Memorandum Opinion and Order. Plaintiffs have not strongly argued the Court's decision on any claims except for those under Title VII, and finding no reason in law or fact to reconsider that decision, all claims other than those under Title VII remain dismissed. Similarly, the law of the case is that Tapscott and Oliver are proper personal defendants. The female plaintiffs having settled their claims, the Court will discuss only the Title VII retaliation claims of the male officers.

The male officers make two separate retaliation claims. The first, alleged under the so-called participation clause of Title VII, is for filing race and sex discrimination charges on their own behalf. The second, alleged in the amended complaint under opposition or assistance clause, is for their assistance to the claims of the female officers. The claims must be addressed separately.

2. The opposition claims.

The participation and opposition clauses are provided in Title VII § 704(a), 42 U.S.C. 20006-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Paragraph 28 of the amended complaint now specifically alleges that the male officers suffered retaliation for assisting the valid claim of the two female plaintiffs. Title VII, 42 U.S.C. § 2000e-3(a) does recognize such claims. See Robinson v. Shell Oil Co., 70 F.3d 325, 327 (4th Cir. 1995) (in dicta). However, for this Court to have jurisdiction, those claims must have been presented to the EEOC during the charge-filing limitations period. The male officers' charge-filing forms, and the affidavits to the EEOC in the plaintiff's summary judgment exhibit entitled "PLAINTIFFS' EEOC RETALIATION CHARGES," nowhere mention this new theory. Plaintiffs now argue that the opposition and assistance claims were meant to be made or perhaps were constructively made, but since the formalities of the EEOC process must be observed and they were not met here, this Court simply does not have authority to read the charges with a liberal eye. By failing to allege retaliation for aiding the female officers' sex discrimination claims, the male officers deprived this Court of any jurisdiction over the retaliation claims now barred by the statute of limitations. The opposition and assistance claims by the male officers are therefore dismissed.

3. The participation claims.

For claims made under the opposition clause, courts require only that the employee reasonably believe the practice involved is unlawful. Mayo v. Kiwest Corp., 898 F.Supp. 335, 337 (E.D. Va. 1995). Unlike the opposition clause, the participation clause grants what appears to be an absolute privilege for filing a claim with the EEOC. See Blizzard v. Newport News Redevelopment & Housing Authority, 670 F.Supp. 1337, 1344 (E.D. Va. 1984). Some courts have held that even a maliciously false charge is protected. E.g., Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1007 (5th Cir. 1969). Title VII strikes a balance

between the damage from false charges and the potential for retribution after true complaints. That balance is confidentiality over EEOC proceedings, on the one hand, and protection for EEOC participation, on the other. See id.

To proceed to trial, the participation claims must clear two hurdles: first, dismissal for failure to state a claim, and second, summary judgment for failure to raise an issue of material fact. The Court concludes that the participation claims fail on either test.

a. Dismissal of the claims.

The dismissal question is whether the Court should interpret Title VII as creating a participation privilege on these unusual facts. When interpreting a statute, generally the clear language of a statute will control, and in fact, the Fourth Circuit has stated that a Court must respect Title VII's clear language in its common usage and may not exercise "ingenuity . . . in order to escape consequences thought absurd." Robinson, 70 F.3d at 328. However, the purpose of statutory interpretation is to respect "the legislative will as expressed in the language." Id. And while inquiry must cease if the language is unambiguous and the statutory scheme is coherent and consistent, incoherence requires further review. The Court finds that the participation clause cannot be coherently applied to the facts of this case.

The participation clause exists because Congress made a determination that when an employee charges wrongdoing by an employer, that question becomes the province of the EEOC and neither courts nor the employer may make any determination of the merits of the wrongdoing allegation. But there must be some sense of reason in any statutory scheme, and in Title VII that sense is the prohibition against "unlawful" behavior in 42 U.S.C. §

2000e-3(a). Where an employee charges not wrongdoing but favoritism in his favor, none of the remedial purposes of Title VII are served by allowing him to use the retaliation provisions to breathe life into his spurious complaint. Where the original charge is a statement of favorable treatment by the employer, the Court concludes that the participation clause does not provide an absolute privilege for charge filing. Further, the Court finds that the male plaintiffs on these particular facts are entitled to no privilege, and their participation claims are dismissed.

Because the Court recognizes that its analysis of the participation clause may present a close issue, the Court will also analyze the claims on a summary judgment theory in the interests of judicial economy.

b. Summary judgment against the claims.

For purposes of this independent section of its opinion, the Court will assume that the claim survives a motion to dismiss. The Court therefore next addresses the propriety of summary judgment.

By attempting to state a new claim in the amended complaint, the male plaintiffs have crystallized the narrow summary judgment issue before the Court. The first claim, presented as the first charge to the EEOC, is of direct discrimination on sex and race. The new claim, as discussed and dismissed above, is of retaliation for assistance and opposition. With the new claims dismissed, all the plaintiff's evidence on retaliation for opposing an anti-female hostile environment is now irrelevant. The only evidence which may resist the City's summary judgment motion is evidence which shows that the first EEOC charge, regardless of any opposition and assistance activity, was the proximate cause of retaliatory action by the City.

Sufficient evidence on this narrow point does not exist. A careful reading of the now-voluminous record may produce a question of material fact as to whether the City retaliated against the male officers for their opposition to unlawful practices against women. If the male officers had preserved that retaliation claim by charge to the EEOC, summary judgment would now be inappropriate. But the point bears repetition: the Court is without jurisdiction to consider the opposition claim.

Parsing the record in parts and as a whole, the Court finds no material evidence that the City retaliated against the male officers for the filing of the first EEOC charges themselves. When read in the light most favorable to the plaintiffs, the record speaks with a clear voice. The City retaliated against the male officers for their claim that Lt. Carroll needed psychological evaluation. It retaliated for the claim that Carroll displayed animus to blacks and women and displayed favoritism to white males. It retaliated for the claim that the working environment was hostile to african americans and females, and even retaliated when the beneficiaries, white males, supported that claim. But the record does not show that the white male plaintiffs suffered discrimination for their gender or race, nor does it show that the white males' EEOC charge to that effect was the motivation for retaliation.

Therefore the Court grants summary judgment against the male officers' participation claims. The Court further notes that a final decision during the motions stage is the ideal outcome for this case. The tangled posture of this litigation, with its discrimination-versus retaliation and participation-versus-opposition clause issues, is highly technical and poses a great risk of confusing the jury. Even with a high caliber of lawyering, the case is fraught with a danger that the jury would misunderstand the issues and

penalize a defendant for conduct which, though offensive, was not with respect to these defendants a violation of the law.

III. Conclusion.

Most of the claims presented by the amended complaint are identical to those of the first complaint, and therefore as to all but the Title VII retaliation claims of the male plaintiffs, the Court's earlier Order is the law of the case. On representation of settlement by the female plaintiffs, the female officers' claims are now dismissed with prejudice. As to the remaining claims, retaliation for participation and opposition, the City's renewed motion is granted. While Title VII recognizes an opposition theory under the facts of this case, those claims were not preserved at the EEOC charge-filing stage and the Court dismisses them for lack of jurisdiction. As to the participation claims, the Court dismisses them and in the alternative also grants summary judgment for the defense. An accompanying Final Order will issue and this case will be placed among the ended causes.

Let the Clerk send a copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

/s/ Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE
Mar 21 1996

APPENDIX D

[Filed March 21, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

C.A. No. 3:95CV662

DAVID W. CHILDRESS, et al.,

Plaintiffs,

v.

CITY OF RICHMOND, VIRGINIA et al.,

Defendants.

By: Richard L. Williams, Senior Judge
United States District Court

FINAL ORDER

This matter is before the Court on defendants' renewed Motion for Summary Judgment. The parties having represented to the Court that the female plaintiffs have settled their claims, the claims of Janice Thompson (now Janice Calhoun) and Virginia Downey are DISMISSED WITH PREJUDICE. As to the male plaintiffs, all claims except those stated for retaliation under Title VII are DISMISSED for the reasons stated in the Court's Memorandum Opinion of November 21, 1995. Also for the reasons stated in that opinion, all Title VII claims by Daniel Quinney are DISMISSED for lack of jurisdiction for failure to file a charge with the EEOC.

For the reasons given in the Memorandum Opinion accompanying this Order, the claims of the other plaintiffs, the six remaining white male officers, all fail. The opposition-retaliation claims are DISMISSED for lack of jurisdiction. The participation-retaliation claims are DISMISSED WITH PREJUDICE for failure to state a claim for which relief may be granted; in the alternative, the Court also considers the participation-retaliation claims for the propriety of summary judgment, on those claims the City's motion for summary judgment is GRANTED.

All claims in the case having been foreclosed by this Order, the Court need not reconsider its earlier decision on the capacity for suit of defendants Marty Tapscott and Jerry Oliver. This case shall thus be closed and placed among the ended causes.

It is SO ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

/s/ Richard L. Williams
SENIOR UNITED STATES DISTRICT JUDGE

Mar 21 1996

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1585

DAVID W. CHILDRESS; AUGUSTUS G. HARVEY, III;
VINCENT J. MATASSA; HENRY W. MEASE;
HOWARD S. NOYES; DANIEL G. QUINNEY;
FLORIAN E. STACHURA,
Plaintiffs-Appellants.

and

VIRGINIA M. DOWN; JANICE M. THOMPSON,
Plaintiffs.

v.

CITY OF RICHMOND, VIRGINIA;
JERRY A. OLIVER, Chief of Police of the
City of Richmond, Virginia, in his official
capacity as Chief of Police of the City of Richmond,
Virginia; MARTY M. TAPSCOTT,
Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

Appeal from the United States District Court for the
Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge
(CA-95-662-3)

Argued: January 27, 1997
Decided: August 5, 1997

Before HALL and MICHAEL, Circuit Judges, and
PHILLIPS, Senior Circuit Judge

Affirmed in part, vacated in part, and remanded by published opinion. Judge Hall wrote the opinion, in which Judge Michael and Senior Judge Phillips joined.

OPINION

HALL, Circuit Judge:

Seven white male police officers filed an action alleging various civil rights violations by their employer, the City of Richmond, and their supervisors. The district court held that the officers had failed to sate Title VII "hostile environment" claims because the discriminatory actions undergirding such claims were directed at blacks and women, not the officers. A due process claim was dismissed for failure to state a claim, and a First Amendment claim was dismissed on the ground that the speech did not involve matters of public concern. Retaliation claims were dismissed for failure to exhaust administrative remedies, failure to state a claim, or failure to raise a genuine issue as to the motive behind the alleged discrimination.

We affirm the dismissal of the due process and First Amendment claims. However, we hold that the officers may state hostile environment claims under Title VII for discrimination directed at black and female officers, and, accordingly, we vacate the judgment dismissing those claims and remand for further proceedings. We also vacate the judgment dismissing the retaliation claims and remand.

I

A

The officers allege that their immediate supervisor, Lt. Arthur Carroll, a while male, made a number of disparaging remarks to and about female and black members of the police force over a two-month period beginning in November 1993. Some of these comments were made in the presence of the black and female officers, while others were made only in the presence of the white officers.

The officers signed a letter to their precinct captain complaining of Lt. Carroll's profanity and outbursts of temper. Although the letter did not mention the specific disparaging remarks, one of the signatories orally conveyed the officers' concerns on that point when he delivered the letter. An investigation was conducted, but no action was taken against Lt. Carroll. The officers were, however, threatened with "adverse consequences" during the investigation.

During the following March and April, each of the officers filed a hostile-environment charge (race and sex) with the EEOC, and each received a right-to-sue letter. Thereafter, they allege that they were subjected to a series of retaliatory actions, including shift changes, transfers, and unfavorable performance evaluations. Each officer (except Quinney) then filed a second EEOC charge, this time claiming retaliation for their initial EEOC charge and related complaints about Carroll. Again, each received a right-to-sue letter.

B

On August 11, 1995, the officers filed their complaint

in the district court against the City and the Chief of Police in his official capacity. They sought relief under Title VII (42 U.S.C. §§ 2000e-2(a)(1) & -3(a)), § 1983, and state law. The officers contend that Lt. Carroll's remarks created both a sexually and racially hostile environment on the force that acted to destroy the necessary sense of "teamwork" between officers of different sexes and races, and that this resultant loss of teamwork raised the possibility that officers in one group might be reluctant to assist officers in another group during the performance of their duties on the streets.

On November 21, 1995, the district court dismissed the hostile environment claims on the ground that Title VII created no such cause of action for persons (white males) complaining of discrimination and harassment directed at others (blacks and females). The court dismissed the § 1983 claims under Rule 12(b)(6) as well. To the extent that the officers relied on a theory that they were deprived of a property interest in "teamwork" without due process, the court found no support in the case law. As for the officers' theory that the retaliation violated their free-speech rights, the court held that the speech at issue (the letter to Captain Hicks) did not involve a matter of public concern.

After the officers filed an amended complaint that refined their retaliation claims, the court issues its final order on March 21, 1996. With regard to the officers' "opposition clause claims - that the officers were retaliated against on the basis of their opposition to Lt. Carroll's discriminatory acts against the female officers - the court dismissed for lack of jurisdiction because such claims were not expressly included in the officers' second EEOC charges and, therefore, the officers had failed to exhaust their administrative remedies. Quinney's opposition-clause claims were dismissed because he had failed to file an EEOC charge complaining of the retaliation.

The participation clause claims - that the officers were retaliated against for "participating in" an EEOC proceeding - were reevaluated and dismissed on alternative grounds. First, the claims were dismissed under Rule 12(b)(6) as "spurious" because the claims concerned "favorable treatment by the employer" and were thus outside even the seemingly absolute privilege of § 2000e-3(a). Second, characterizing the question as a close one, the court proceeded to consider the participation-clause claims under summary judgment standards and dismissed the claims because the officers had failed to create a genuine issue that the EEOC charge was in fact the proximate cause of the alleged retaliation by the City.[1]

The seven officers appeal.[2]

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[1] The district court dismissed Quinney's participation-clause retaliation claim on the ground that he had failed to file a second EEOC charge raising such claim. Under *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992), however, a second EEOC charge (claiming retaliation for filing a first charge of discrimination) is not a jurisdictional prerequisite to filing a suit asserting a Title VII participation-clause claim. We will therefore consider Quinney's participation-clause claim as having been dismissed under the same rationale as the district court employed in dismissing the corresponding claims of the other officers.

[2] Two female officers were plaintiffs in the suit but settled prior to final judgment; their claims were dismissed. The male officers do not appeal the dismissal of their pendent state law claims.

II

A

The core premise of the district court's orders is that discrimination directed against one group (blacks or females) is discrimination in favor of the other group (white men):

> Title VII permits no claim for hostile environment based on same-sex harassment where there is neither an allegation of *quid pro quo* nor some sexual component of the harassing behavior.... To the extent that the male officers attempt to assert the rights of other persons, female officers, they clearly state no claim. To the extent they assert a general Title VII right to be free of tensions caused by special treatment in their favor, the male officers' complaints should be dismissed because they attempt to create a new Title VII right out of whole cloth. Any way their complaints are viewed, the male officers are attempting to recover for violations of other peoples' civil rights, which they have no standing to do. It should be noted that the male officers do not allege that the lack of "teamwork" rises to the level of having women create a hostile working environment against them - rather, the hostility alleged is the hostility of the supervisor toward their compatriots.

Childress v. City of Richmond, Virginia, C.A. No. 3:95CV662 at 7 (E.D. Va. No. 21, 1995) ("Memorandum

Opinion").[3] The racially hostile environment claims were dismissed on the same reasoning. *Id.* At 8. The court's premise is incorrect.

The source of the officers' Title VII hostile-environment claims is found in 42 U.S.C.A. § 2000e-2(a)(1) (West 1994), which provides that it is "an unlawful employment practice for an employer. . . to discriminate against any individual with respect to his compensation, conditions, or privileges of employment, because of such individual's race, color, relation, sex, or national origin." Sexual or racial harassment that is "sufficiently severe or pervasive [enough to]. . . create an abusive working environment" is within the proscriptive ambit of the statute. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (sexual harassment); *Davis v. Monsanto Chemical Co.*, 858 F.2d 345 (6th Cir. 1988) (racial harassment). The allegations regarding Lt. Carroll's remarks and the City's refusal to remedy the situation are sufficient to make out a violation of

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3

Citations herein to this opinion will be "district court's 1st op. at ___," and citations to the court's March 21, 1996, memorandum opinion will be "district court's 2d op. at ___."

§ 2000e-2(a)(1) under *Meritor*,[4] at least for purposes of a motion to dismiss. *See Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir. 1969) ("A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.").

The problem is standing. Even if we assume, as we do at this point, that the City has discriminated against its black and female officers in the "terms, conditions, privileges" of *their* employment, we need to determine whether the plaintiffs are "persons aggrieved" and, if so, whether they have suffered an injury that would entitled them to bring this action.

B

As part of is enforcement scheme, Congress conferred a private right of action on "the person claiming to be aggrieved . . . by the alleged unlawful employment practice." 42 U.S.C.A. § 2000e-5(f)(1) (West 1994). Because the

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[4] The district court's reliance on the same-sex sexual harassment cases claims is misplaced. In *McWilliams v. Fairfax County Bd. Of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S.Ct. 72 (1996) (which was decided after the district court dismissed the officers' hostile environment claims, but which is consistent with the cases relied on by the district court), we held that same-sex harassment did not amount to a violation of Title VII because the harassment was not "because of" the plaintiff's (or, we add, anyone else's) sex. McWilliams had no Title VII claim simply because an essential predicate, a violation of the statute, was absent.

purposes and relevant language in Title VII and Title VIII are so similar, we believe we should begin by examining the Court's reasoning in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), to determine whether the Supreme Court's recognition of associational rights under Title VIII militates in favor of conferring a comparable discriminatory-environment cause of action on men to complain about discrimination directed at women, or on white persons to complain of similar treatment of blacks.

C

In *Trafficante*, white tenants sued the owners of their apartment complex under Title VIII for the owners' alleged discrimination in preventing blacks from renting units in the same complex. The injury claimed was that of "the loss of important benefits from interracial associations." *Id.* At 210. The Court held that the injury alleged brought them within the broad ambit of "person[s] aggrieved," as that term was defined in § 810(a) of Title VIII of the Civil Rights Act of 1968: "Any person who claims to have been injured by a discriminatory housing practice."[5] In so holding, the Court espoused the view of an appeals court that the phrase "by a person claiming to be aggrieved," as used in the Civil Rights Act of 1964 (the same statute involved in the officers' suit), "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" *Trafficante*, 409 U.S. at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971). *See also Fair Employment Council of Greater Washington, Inc. v. BMC*

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Pub.L. 90-284, Title VIII, § 810(a). This definition is now found at 42 U.S.C. § 3602(I)(1) (Pub.L. 100-430, § 5, Sept. 13, 1988, 102 Stat. 1619).

Marketing Corp., 28 F.3d 1268, 1278 (D.C. Cir. 1994) (Title VII is the type of statute that "confer[s] a cause of action upon everyone who meets the Article III requirements - that is, anyone `genuinely injured by conduct that violates *someone's* ... rights' under the statute.") (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979)). We now that this construction of the term "person aggrieved" expressly applied by the Supreme Court to Title VIII cases and implicitly approved for Title VII cases, and apply it to the officers' case.

Trafficante's construction of the term "person aggrieved" and the extension of Article III standing to the victims of indirect discrimination has been adopted by every court of appeals that has considered the issue of a white person's standing to sue under Title VII for associational or hostile environment claims flowing from discriminatory conduct directed at black persons. *See Stewart v. Hannon*, 675 F.2d 846, 848-50 (7th Cir. 1982) (exclusion of blacks from school principal positions); *EEOC v. Mississippi College*, 626 F.2d 477, 481-83 (5th Cir. 1980) (failure to recruit and hire black faculty members); *EEOC v. Bailey Co., Inc.*, 563 F.2d 439, 452-54 (6th Cir. 1977) (failure to recruit and hire blacks); *Waters v. Heublin, Inc.*, 547 F.2d 466, 469-70 (9th Cir. 1976) (lower pay to blacks); *see also BMC Marketing*, 28 F.3d at 1277-78 (fair-employment advocacy organization has a cause of action under Title VII if Article III's injury-in-fact requirement is met).

The reasons given for transposing *Trafficante*'s broad standing rule of Title VII cases include the similar language

of the 1964 and 1968 statutes, [6] the important enforcement role conferred on private individuals in both statutory schemes, the citation of *Hackett* in *Trafficante*, the identity of the purpose of each statute, and the consistent interpretation by the EEOC. We subscribe to the analysis of each of these opinions, and, as additional support for our decision, we note the failure of Congress to overrule these decisions in the Civil Rights Act of 1991, in which fairly extensive changes to Title VII were made.[7] *See Cannon v. Univ. Of Chicago*, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.").

We hold that white men have standing to assert

6

The definition of proscribed conduct in Title VII differs in one minor respect from that in Title VIII. In the employment field, 42 U.S.C. § 2000e-2(a)(1) makes it illegal to discriminate against any individual "because of *such individual's* race ... [or] sex ...." (emphasis added), whereas the housing statute, 42 U.S.C. § 3604(a)-(b), makes it unlawful "[t]o refuse to sell or rent ... to any person because of race ... [or] sex ...." or "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling ... because of race ... [or] sex ...." Because the only reasonable reading of the latter provision is a prohibition against discrimination "against any person because of *that person's* race or sex," we attach no significance to this difference in wording.

7

See Pub.L. 102-166, Title I, Nov. 21, 1991, 105 Stat. 1074-76.

hostile environment claims under Title VII when the discriminatory conduct is directed at blacks or females. We believe that *Trafficante* compels this result.[8]

III

A

The statute proscribing retaliation against persons complaining of unlawful discrimination comprises two prongs, the "opposition clause" and the "participation clause." The section provides that "it shall be an unlawful employment practice for an employer to discriminate against any individual ... because he has *opposed* any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added). The officers allege retaliation flowing from two sources: the in-house complaints, including the initial letter to Captain Hicks, and the charges filed with EEOC.

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[8] In holding that Title VII permits white males to bring hostile environment claims, we do not express an opinion on whether the injury alleged - described by the officers as a "loss of teamwork" - is one that would satisfy Article III's requirement of an injury "fairly traceable" to the challenged action. *Allen v. Wright*, 468 U.S. 737, 751 (1984). We also express no opinion as to whether the alleged harassment was "sufficiently severe or pervasive" enough to constitute a hostile environment under *Meritor*. We leave these questions for the district court's determination.

The district court acknowledged that there was evidence of retaliation in the record, but it nevertheless dismissed both claims. Initially, the dismissal flowed from the threshold ruling that the plaintiffs had failed to even state a claim for race or sex discrimination. After the complaint was amended, the district court dismissed the opposition-clause claims on a different basis. The district court noted that there was evidence in the record to make out a genuine issue as to whether the plaintiffs were retaliated against for assisting the females by opposing Lt. Carroll's behavior. District court's 2d op. at 7. However, because the officers' second EEOC charges did not mention their pre-filing opposition as a motivation for the alleged retaliation, they had failed to exhaust their administrative remedies.

Recognizing that participation claims are usually absolute - no matter what the merits of the EEOC claim itself, there can be no retaliation *for filing it* - the district court applied a "sense of reason" rule and held that "where an employee charges not wrongdoing but favoritism in his favor," his complaint is "spurious." District court's 2d op. at 6. Acknowledging that the issue was a close one, the court went on to discuss the participation-clause claims under a summary judgment standard and found that there was evidence that the City retaliated for the initial letter, that Carroll displayed animus towards blacks and women, and that the environment was hostile to blacks and women. But, the court concluded, "the record does not show that the white male plaintiffs suffered discrimination for their gender or race, nor does it show that the white males' EEOC charge to that effect was the motivation for retaliation." *Id.* at 7-8. Accordingly, the participation-clause claims were dismissed.

B

Our discussion in Part II disposes of the appeal of the

Rule 12(b)(6) dismissal of the participation-clause claims; the claims are certainly not "spurious." With regard to the alternative basis for the dismissal, the City argues that there had been no retaliation because there had been no showing of adverse action against each plaintiff. The record refutes this assertion. At the very least, the plaintiffs have produced evidence that raises a genuine issue as to whether they have been transferred to new and unfavorable shifts or were given lower performance ratings than they deserved.

As the lower court noted, the record does show that the City retaliated against them "for [their] claim that Carroll displayed animus to blacks and women." *Id.* At 7. Given this evidence of retaliation, it cannot be said at this point that the EEOC charges did not, at least in part, motivate the City actors. Therefore, we vacate the district court's grant of summary judgment to the City defendants on the participation-clause claims.

C

"Opposition clause" claims differ in several respects from "participation-clause" claims. First, the claim must be exhausted by the filing of an EEOC claim raising the opposition claim, and the scope of such claim in a judicial complaint is limited to the allegations contained in an EEOC charge. Second, only opposition to "practices made unlawful [by Title VII]" is protected. In its first opinion, the court dismissed these claims because the male plaintiffs could not have a "reasonable belief" in the validity of the hostile environment claims. District court's 1st opnion at 9 (citing

Mayo v. Kiwest Corp., 898 F.Supp. 335, 337 (E.D. Va. 1995)[9]).

After the complaint was amended, the district court dismissed the opposition claims because the officers' second EEOC charges linked specific retaliatory measures solely to each officer's "filing of an EEOC charge." The failure to specifically mention their opposition-clause theory - that the City also retaliated because of the plaintiffs' assistance to the female officers - led the district court to rule that it had no jurisdiction to consider these unexhausted claims. District court's 2d op. at 3-4. The law, however, is flexible enough to permit the court to exercise jurisdiction over these claims.

"Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit." *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 963 (4th Cir. 1996); *see also Nealon*, 958 F.2d at 590 ("The scope of a Title VII lawsuit may extend to any kind of discrimination like or related to allegations contained in the [EEOC] charge.") Here, each of the second EEOC charges could be fairly read to include a claim that the charging officer was being treated unfairly for "opposing" the practices that prompted that officer's initial hostile environment charge. Indeed, the affidavits attached to the second set of EEOC charges clearly convey a theory that the initial EEOC charges (the participation) were fused to the earlier in-house complaints as the source of the alleged retaliation. The EEOC's investigation of retaliation would

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Subsequently affirmed, 94 F.3d 641 (4th Cir. 1996) (unpublished).

necessarily encompass "opposition" and "participation" motives for the adverse employment actions allegedly taken in the wake of the officers' complaints. Accordingly, we vacate that portion of the district court's order dismissing the retaliation claims and remand for further proceedings.[10]

IV

A

The plaintiffs also claimed that the adverse employment actions taken in response to their complaints about Lt. Carroll violated their First Amendment free-speech rights, as made actionable under 42 U.S.C. § 1983. The district court dismissed these claims under Fed.R.Civ.P. 12(b)(6) on the ground that the City had no "official policy or custom" of discrimination that would subject it to § 1983

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[10] Quinney did not file a retaliation charge with the EEOC. However, in his only EEOC charge, he charged that he had "been subjected to harassment" and "removed from [his] normal working station" because of his involvement in the complaints against Lt. Carroll. EEOC, as amicus curiae, asserts that the other officers' initial charges contain similar references to retaliatory measures taken in response to their opposition to Lt. Carroll's remarks and that their "opposition claims were, in fact, within the scope of the EEOC's investigation that followed the charges of discrimination." EEOC's brief at 27. Retaliation may well be a claim that, under *Evans*, could be deemed as having been "developed by reasonable investigation of the original complaint." We vacate the order dismissing Quinney's opposition-clause retaliation claims and remand for further consideration of the exhaustion issue in light of *Evans*.

liability and, further, that the officers' complaints involved intramural rather than public concerns. *DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995). We affirm the dismissal of these claims on the reasoning of the district court. District court's 1st op. at 11-12.

B

The final issue involves the officers' claim that they have a property right in "teamwork" and that the deprivation thereof violated their right to due process. Finding no support in the law for such a claim, the district court dismissed the claim under Fed.R.Civ.P. 12(b)(6). We again affirm on the court's reasoning. District court's 1st op. at 10-11.

V

The dismissal of the § 1983 claims is affirmed. The dismissals of the Title VII hostile environment and retaliation claims are vacated, and these claims are remanded for further proceedings.

AFFIRMED IN PART, VACATED
IN PART, AND REMANDED

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1585

DAVID W. CHILDRESS; AUGUSTUS G. HARVEY, III;
VINCENT J. MATASSA; HENRY W. MEASE;
HOWARD S. NOYES; DANIEL G. QUINNEY;
FLORIAN E. STACHURA,
Plaintiffs-Appellants.

and

VIRGINIA M. DOWN; JANICE M. THOMPSON,
Plaintiffs.

v.

CITY OF RICHMOND, VIRGINIA;
JERRY A. OLIVER, Chief of Police of the
City of Richmond, Virginia, in his official
capacity as Chief of Police of the City of Richmond,
Virginia; MARTY M. TAPSCOTT,
Defendants-Appellees.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION;
WEST VIRGINIA MANUFACTURERS ASSOCIATION,
Amici Curiae.

Appeal from the United States District Court for the
Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge
(CA-95-662-3)

Argued: December 2, 1997

Decided: January 15, 1998

Before WILKINSON, Chief Judge, WIDENER, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL and MOTZ, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by published per curiam opinion. Judge Luttig wrote a concurring opinion, in which Judge Wilkins and Judge Williams joined

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OPINION

PER CURIAM:

This is an appeal by seven white male police officers from successive orders of the district court that dismissed on various grounds their action alleging "hostile environment" and retaliation claims under Title VII (42 U.S.C. §§ 2000e-2(a)(1) & (3)) and First Amendment and procedural due process claims under 42 U.S.C. § 1983 against the City of Richmond and two of its police chiefs.

The appeal was first heard by a panel of this court which vacated and remanded for further proceedings those portions of the judgment that had dismissed the Title VII hostile environment and retaliation claims but affirmed those portions that had dismissed the § 1983 First Amendment and procedural due process claims. See 120 F.3d 476 (4th Cir. 1997). By majority vote of the active circuit judges of this court, the panel decision was later vacated, and the appeal ordered to be reheard en banc. See id. At 476.

The factual background and procedural history of the case are fully set out in the vacated panel opinion (id. At 478-79) and

need not be repeated here in full. It suffices to summarize here.

The Title VII and § 1983 claims grew out of allegedly discriminatory conduct of the complaining officers' immediate supervisor, a Lt. Carroll, that led the complaining officers first to protest, then to file Equal Employment Opportunity Commission ("EEOC") charges respecting Carroll's conduct. Specifically, the facts alleged were that Carroll had repeatedly made disparaging remarks to and about female and black members of the police force that adversely affected vital relationships and working conditions within the force; that reports and complaints about Carroll's conduct to responsible City officials by the complaining white officers resulted in no corrective action; and that following the complaining officers' filing with the EEOC of title VII charges concerning Carroll's conduct the officers were subjected to retaliation by City officials in the form of a series of adverse employment actions.

Based on these alleged facts, the complaining officers asserted claims under Title VII that Carroll's gender and race-based harassment of black and women members of the police force had created for them a hostile workplace environment, and that the City had unlawfully retaliated against the complaining officers both for their internally registered opposition to Carroll's conduct ("opposition clause" claim) and for their having filed EEOC charges concerning it ("participation clause" claim) and claims under § 1983 that the City's retaliatory actions violated the complaining officers' First Amendment speech rights and their Fourteenth Amendment right not to be deprived of property without due process of law.

The district court dismissed the Title VII hostile environment claim on the ground that the complaining officers did not

have standing under Title VII to bring an action for discrimination directed at others; dismissed the Title VII "opposition clause" retaliation claim on the ground of failure properly to exhaust administrative remedies before the EEOC; dismissed the Title VII "participation clause" claim on alternative grounds that the claim was "spurious" and that as a matter of law the officers' filing of charges was not the proximate cause of the allegedly retaliatory actions by the City; dismissed the § 1983 First Amendment claim on the dual grounds that as a matter of law the City had no policy or custom of permitting the kind of conduct charged to Carroll, and that the complaining officers' speech concerned intramural rather than public concerns; and dismissed the § 1983 procedural due process claim on the ground that as a matter of law the officers had no constitutionally protected property interest in the "teamwork" of which they claimed to have been deprived. 907 F.Supp. 934 (E.D. Va. 1995) (dismissing Title VII hostile environment claim and § 1983 First Amendment and due process claims); 919 F.Supp. 216 (E.D. Va. 1996) (dismissing Title VII "participation clause" and "opposition clause" retaliation claims).

Having reheard the appeal en banc, we affirm the district court's judgment in its entirety. Dismissal of the Title VII "hostile environment" claim and the "participation clause" and "opposition clause" retaliation claims is affirmed by an equally divided vote on the en banc court. Dismissal of the § 1983 First Amendment and procedural due process claims is affirmed on the reasoning of the district court. See 907 F.Supp. 934 (E.D. Va. 1995).

SO ORDERED

LUTTIG, Circuit Judge, concurring:

Today, the en banc court correctly affirms, in my view, the

judgment of the district court dismissing the instant action in which white male employees allege that their white male superiors made disparaging comments about black and female co-workers, thus subjecting these co-workers to a hostile work environment in violation of Title VII.

Title VII, which was enacted as part of the Civil Rights Act of 1964, provides that it "shall be an unlawful employment practice for an employer" "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) & (a)(1). In addition to relying upon the Equal Employment Opportunity Commission to enforce this statutory prohibition, Congress has also created a private cause of action authorizing "aggrieved persons" to bring civil actions to enforce the act.[1]

Plaintiffs and the EEOC argue that Congress intended, through its use of the term "aggrieved persons" in Title VII, to authorize private causes of action for all persons who can satisfy Article III's standing requirements, regardless of whether those persons are themselves direct victims of an unlawful employment practice. In other words, they contend

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[1] Section 2000e-5(f)(1) of Title VII provides that "a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). I use the term "aggrieved person" as shorthand for, and synonymous with, the precise statutory term "person claiming to be aggrieved."

that Congress chose the phrase "aggrieved persons" in order to override all prudential standing limitations to bringing a Title VII action, effectively authorizing such actions to the limit permitted under constitutional standing doctrines. Under this interpretation, to be sure, the plaintiffs have stated a cause of action under Title VII because they allege that (1) the defendant discriminated against black and female employees in the "terms, conditions, or privileges" of their employment by creating a hostile work environment for blacks and women, and (2) the plaintiffs have suffered a sufficiently cognizable Article III injury caused by the defendant's unlawful employment practices — namely, the breakdown of esprit de corps that results from working in a racially or sexually polarized environment.

Congress, however, was not writing on a clean slate when it authorized "aggrieved persons" to bring Title VII actions. In the law, the phrase "aggrieved person" has long been a "term of art" ordinarily understood to mean those persons who could satisfy both prudential and constitutional standing limitations. In fact, the Supreme Court itself has recognized as much:

> The phrase "person adversely affected or aggrieved" is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts.... We have thus interpreted § 702 [the judicial review provision of the APA] as requiring a litigant to show at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the "zone of interests to be protected or regulated by the statute" in question.

Director, OWCP v. Newport News, 514 U.S. at 125 (1995) (citations omitted); see also Kansas City Southern Industries v. Interstate Commerce Commission, 902 F.2d 423, 429 (5th Cir. 1990) (observing in analysis of a different statute that "[t]o determine whether a petitioner is aggrieved, we generally incorporate traditional article III and prudential standing analysis.") Among the prudential limits on standing is not only the "zone of interests" requirement, but also, of course, the general prohibition against third-party standing. That is, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975); see also Valley Forge College v. Americans United For Separation of Church and State, 454 U.S. 464, 474 (1982). Congress may, if it chooses, override prudential standing limitations and authorize all persons who satisfy the Constitution's standing requirements to bring particular actions in federal court. But where it has not done so, and instead has simply invoked the term of art "aggrieved person," the default rule generally is that Congress has created a cause of action only for those persons who can satisfy both types of standing requirements--constitutional and prudential.

Accordingly, because Congress used the term of art "aggrieved person" in Title VII, and chose not to define that term for purposes of that statute; because the background understanding of "aggrieved person" includes prudential limits on standing; and because one of the primary prudential limitations is that a plaintiff cannot assert the rights and interests of another, I would interpret the term "person aggrieved" in Title VII so as to incorporate the prudential rule against third-party standing. Thus, in my view, in order to qualify as a "person aggrieved" authorized to bring a Title VII action, a plaintiff must be a member of the class of direct victims of conduct prohibited by Title VII, that is, the

plaintiff must assert his own statutory rights and allege that he, not someone else, has been "discriminate[d] against ... with respect to his compensation, terms, conditions, or privileges of employment, because of [his] race, color, religion, sex, or national origin." It follows that, because the white male plaintiffs in the present case assert only the rights of third-parties to be free from race or sex-based discrimination in the workplace, they have not stated a cause of action under Title VII.[2]

Although plaintiffs and the EEOC rely upon the Supreme Court's decision in Trafficante v. Metropolitan Life Insurance, 409 U.S. 205 (1972), not only do I find nothing in that opinion contrary to the conclusion I read; I read that case to all but confirm this conclusion. In Trafficante, white tenants brought suit under Title VIII of the Civil Rights Act of 1968 against the owners of their apartment complex for allegedly discriminating against blacks in the renting of units in the housing complex. The Supreme Court held that Title VIII, which, like Title VII, authorizes "aggrieved persons" to bring civil actions to enforce its substantive prohibitions, authorizes a cause of action for any person meeting the Article III requirements--that is, any person genuinely injured

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The white male plaintiffs have not alleged that they were discriminated against because of their race or sex, and as discussed in the vacated panel opinion in this case, such an assertion would be difficult to maintain because some of the offensive comments made by plaintiffs' supervisors "were made in the presence of black and female officers, while others were made only in the presence of the white officers." Childress v. City of Richmond, 120 F.3d 476, 478 (4th Cir. 1997). Thus, plaintiffs could not maintain that they were singled out because of their race or sex.

by conduct that violates anyone's rights under the statute.

Unlike Title VII, which simply uses the term "aggrieved person" without definition, however, Title VIII also defines the term "aggrieved person" for purposes of that statute. And the statute defines "aggrieved person" broadly, in § 810, as "any person who claims to have been injured by a discriminatory housing practice." 409 U.S. at 206 (quoting section 810(a) of Title VIII, today located at 42 U.S.C. § 3602(i)(1). Thus, in Trafficante, the Supreme Court interpreted the phrase "aggrieved person" not as a term of art, but, rather, as a statutorily defined term. 409 U.S. at 208; see also Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 120-21 (1979) (Rehnquist, J., dissenting) ("In Trafficante ... we held that the broad definition given `person aggrieved' in § 810 indicated a congressional intent to accord apartment dwellers ... an actionable right to be free from the adverse consequences flowing to them from racially discriminatory rental practices directed at third parties.") (emphasis added). Because the statutory definition of "aggrieved person" in Title VIII is so broad--even using the term "injury," a term of constitutional standing that references the outer limit of Congress' power to create causes of action--it is, of course, unsurprising that the Court concluded that Title VIII clearly authorizes a cause of action for all persons who suffer a constitutionally cognizable Article III injury-in-fact resulting from unlawful housing practices. And because Congress had statutorily eliminated the prudential standing requirements through its express definition, it is likewise unsurprising that the Court held that the white plaintiffs in Trafficante had standing to assert a claim for the loss of interracial associations resulting from living in a racially nonintegrated housing complex: The plaintiffs had suffered constitutional injury-in-fact, even though they had not themselves been the direct victims of discrimination but were asserting the rights of third-party victims instead.

In notable contrast to Title VIII, Title VII does not define the term "aggrieved person." Not only does the complete absence of a definition in Title VII imply that Congress chose to incorporate the "term of art" definition of "aggrieved person," which, as discussed, includes prudential standing limitations; but the presence of a definition of the term in Title VIII juxtaposed with the absence of such a definition in Title VII strongly evidences that Congress intended different meanings for the term "aggrieved person" across the two statutes, further reinforcing the conclusion that "aggrieved person" in Title VII must be interpreted to incorporate prudential standing limitations.[3]

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[3] Moreover, neither the plaintiffs nor the EEOC has cited the court to any statement in the legislative history of Title VII like that in the history of Title VIII, which supports the argument that Congress intended to broaden the scope of "aggrieved" persons beyond those individuals directly victimized by unlawful employment discrimination. See Trafficante, 409 U.S. at 210 & n. 10 (reciting that Congress intended Title VIII also to benefit those "who were not the direct objects of discrimination [who] had an interest in ensuring fair housing, as they too suffered" (quoting Hearings before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency on S. 1358, S. 2114, and S. 2280, 90th Cong., 1st Sess. (1967)).

Nor, in further contrast of Title VII from Title VIII, is there the same need for the additional private enforcement of Title VII that the Trafficante Court concluded existed for Title VIII. In particular, the Court concluded that additional private enforcement of Title VIII was required because the Department of Housing and Urban Development, the agency

If any additional confirmation of the persuasiveness of this interpretation is needed, one need look only to the EEOC, the agency charged with administering Title VII. During oral argument before the en banc court, counsel for the EEOC herself argued--indeed, specifically on the authority of the Supreme Court's decision in Director, OWCP v. Newport News--that "aggrieved person" is in fact a term of art that generally incorporates both prudential and constitutional limits on standing. (Although it was unclear precisely why she believed that this observation supported the EEOC's interpretation, as opposed to the one I describe above, I suppose she thought that it followed from the fact that the term is one of art, that the same meaning should be ascribed to the term in Title VII as in Title VIII.). But then, when confronted with the next obvious question of why, only four years after it enacted Title VII without a definition of "aggrieved person," Congress would have defined the same term in Title VIII, and defined it broadly as it did, if it was not to eliminate the prudential limitations that it believed would otherwise exist by virtue of the accepted understanding of the term, the agency's counsel could offer no explanation at all. Equally revealingly, in response to the related question of whether, under the EEOC's interpretation, the definition of "aggrieved person" in Title VIII would not be superfluous, counsel also could only agree.

That the EEOC itself would have no response to the first of

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charged with administering Title VIII, had "no power of enforcement," and the Department of Justice had only meager resources with which to enforce the Act. Id. at 210-11. It goes without saying that the EEOC, at least today, is fully capable of enforcing the provisions of Title VII through its own enforcement proceedings, if need be. See, e.g., 42 U.S.C. § 2000e-5(a) & 5(f).

these questions other than the obvious one, and that it would be obliged to answer the second in the affirmative, is, as far as I am concerned, essential confirmation of the error of the interpretation advanced by the plaintiffs and the EEOC, and in turn, of the correctness of the interpretation of Title VII upon which I primarily rest my decision today.

For these reasons, I would affirm the judgment of the district court.

Judges Wilkins and Williams join in this opinion.

APPENDIX G

STATUTORY PROVISIONS

42 U.S.C. § 2000e-5(f)(1) (Title VII)

(f) Civil action by Commission, Attorney General, or person aggrieved. . . .

(1) . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleged was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. . . .

* * *

42 U.S.C. § 3613(a)(1)(A) (Title VIII)

Enforcement by private persons

(a) Civil Action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

* * *

42 U.S.C. § 2000e-2(a) (1) and (2) (Title VII)

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of

employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * -

42 U.S.C. § 3604(a) (Title VIII)

Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

* * *

42 U.S.C. § 3602 (Title VIII)

Definitions

As used in this subchapter--

(i) "Aggrieved person" includes any person who--

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a

discriminatory housing practice that is about to occur.

* * *

42 U.S.C. § 2000e (Title VII)

Definitions

For the purposes of this subchapter--

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

. . . .

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

* * *

42 U.S.C. § 2000e-3(a) (Title VII)

Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

APPENDIX H

Joint Appendix-Volume II-In Record Of United States Court of Appeals for the Fourth Circuit

Excerpts from deposition of Lt. Arthur T. Carroll (Jt. App. Vol. II, pp. 590-591)

Q. Who's number one and two in the toss-up?

A. Mease and Harvey.

Q. They're number one and two?

A. Or vice-versa.

Q. Or vice-versa. And then number three is Childress?

A. Uh-huh.

Q. You're shaking your head up and down?

A. Yes, I'm sorry.

Q. And how do you know that these three are number one, two, toss-up three?

A. As everything evolved, okay?

Q. Yes.

A. They led the way from one to the other.

Q. What do you mean "led the way from one to the other"? You mean from the letter to Roy West?

A. From the letter to the news media to EEOC.

Q. You think these are the three that did it?

A. Yes.

APPENDIX I

Joint Appendix-Volume I-In the Record of the United States Court of Appeals for the Fourth Circuit

Amended Complaint - Paragraph 9(c) (Jt. App. Vol. I, pp. 59-60)

[9] (c) Carroll's biased statements were therefore clearly against the favor of any police officer, regardless of race or gender, because his statements served to hostilely divide the officers on the basis of race and gender, creating a hostile working environment for all officers to the detriment of their personal safety and the public welfare. As examples, in plaintiffs' knowledge it is quite possible that a male police officer receiving a female officer's call for help might decide to be "delayed" on another police matter from responding, or a black police officer might decide to be so "delayed" upon receiving a white police officer's call for help, or the reverse might occur. The fear and distrust resulting from Carroll's biased statements create a hostile work environment for all. This is especially so when black and female officers perceive themselves as discriminatorily less favored, and white male police officers perceive themselves as discriminatorily more favored.

APPENDIX J

Joint Appendix-Volume I-In the Record of United States Court of Appeals for the Fourth Circuit

City of Richmond June 28, 1994 Memorandum Jt. App. Vol. I, pp. 216-217)

(RICHMOND) VIRGINIA SEAL) CITY OF RICHMOND (FOR INTRACITY CORRESPONDENCE) FILE

TO: Major Charles W. Bennett, Jr. DATE: June 28, 1994
Deputy Chief, Patrol Operations

FROM: Captain Frederick M. Hicks
Officer-in-Charge, Second Precinct

SUBJECT: RECOMMENDATION FOR REASSIGNMENT

As soon as possible, or at least by Saturday, July 9, 1994, I recommend that Sergeant Augustus G. Harvey, III and Patrolman Henry T. Mease be transferred from "A" Platoon, Second Precinct to other, separate, units within Patrol Operations.

I base my recommendation on the following:

1. Since the complaint made against Lieutenant Arthur T. Carroll in January, 1994, morale has greatly suffered on this platoon. It is in the best interest of the Police Department to reassign these two officers, in order that we can go about the business of "rebuilding" this platoon.

2. During my investigation into the complaint against

Lieutenant Carroll, both officers indicated that they were either afraid of or intimidated by Lieutenant Carroll to various degrees, and both expressed that they would rather not work for him.

3. Most importantly, serious safety issues have arisen. The sergeants on "A" Platoon themselves concede that the episode has sharply divided the platoon. Some officers no longer speak to certain other officers.

Lieutenants and sergeants on both the evening and midnight platoons have recently come to me, with information and concerns brought to them by their patrol officers as well as some of their own observations, indicating that

> some of the day shift officers no longer back each other on calls,
>
> some officers remain out of service needlessly while other officers answer calls alone that should require a back-up unit, and
>
> some officers openly express negative feelings toward officers on the other side of the issue (the original complaint letter and whether certain officers did or didn't sign it).

At a meeting I held last week with the precinct lieutenants, they were unanimous in their concern that the split in "A" Platoon has degenerated into a grave safety issue, and that they were worried that some officer might become injured by the lack of proper action by a colleague.

I share the concerns expressed by the other precinct supervisors and feel that the reassignment of these two officers will be a giant step toward restoring a safer work environment and improving police effectiveness. It will also begin to reestablish trust and camaraderie among the day shift personnel.

Urgent attention to this matter is appreciated.

(2)

Supreme Court, U.S.
FILED
MAY 14 1998
CLERK

No. 97-1723

In The

Supreme Court of the United States

October Term, 1997

DAVID W. CHILDRESS, AUGUSTUS G. HARVEY, III, VINCENT J. MATASSA, HENRY W. MEASE, HOWARD S. NOYES, DANIEL G. QUINNEY, FLORIAN E. STACHURA,

Petitioners,

vs.

CITY OF RICHMOND, VIRGINIA; JERRY A. OLIVER, Chief of Police of the City of Richmond, Virginia, in his official capacity as Chief of Police of the City of Richmond; and MARTY M. TAPSCOTT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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APPENDIX

Appendix A — Excerpts from Brief of Appellees, *Childress, et al. v. City of Richmond, et al.* Record No. 96-1585, Dated September 9, 1997 ..... 1a

STATEMENT OF THE CASE

This petition is filed seeking reversal of the dismissal of petitioners' Title VII racially and sexually hostile environment claims, dismissal of their Title VII claim of retaliation for filing a charge with the Equal Employment Opportunity Commission (EEOC), and dismissal of their Title VII claim of retaliation for opposing prohibited practices. As detailed below, there is no cause for this Court's review of the dismissal of these claims.

A. Petitioners have misrepresented the nature of the charges they filed with the EEOC.

On page 3 of the Petition, petitioners state, "During the following March and April, each of the officers filed a hostile-environment charge (race and sex) with the EEOC." Although technically correct, that statement is substantively misleading. Each petitioner is a white male who filed an initial charge of discrimination with the EEOC alleging he was harassed and subjected to a sexually and racially hostile environment **because of "*my* race, White and sex, male".**

Each, except petitioner Quinney, subsequently filed a charge of retaliation with the EEOC claiming acts of retaliation for having filed his previous charge of discrimination with the EEOC. The petitioners filed no other charges with the EEOC.

B. Petitioners have misrepresented the basis on which Judge Luttig determined that they were not aggrieved within the meaning of Title VII.

On page 7 of the Petition for Writ of Certiorari, petitioners state,

> Judge Luttig reached this conclusion [that petitioners lacked standing under Title VII] on the basis that

> Title VIII formally defines the term "aggrieved person" . . . under the general heading "Definitions", whereas in Title VII, which uses the term "aggrieved person" that term is not formally defined . . .

This is a misleading characterization of Judge Luttig's analysis. In his concurring opinion, Judge Luttig reasons that because Title VII does not define "aggrieved person", Congress intended the phrase to be interpreted as a term of art, which requires the application of prudential principles of standing which, in turn, requires a party to assert his own rights as a basis for relief. Applying prudential standards to this case, Judge Luttig concluded that petitioners did not have standing to pursue this action under Title VII because they were asserting the rights of others. (App. 52a-53a).

REASONS FOR DENYING THE WRIT

1. The petition for a writ of certiorari should be denied because although petitioners, all white males, filed a charge of discrimination with the EEOC complaining that they were discriminated against because of their race and their sex, the Amended Complaint contains no allegations from which one can reasonably infer that the conduct of which they complain constituted discrimination against them because of their race and sex.

Each of the petitioners filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging he was subjected to a sexually and racially hostile environment because of "my race, White and sex, male".[1] However, all of the allegations forming the basis for the charge consisted of disparaging remarks about blacks and women.

---

1. *See* Joint Appendix, pp. 100, 112, 133, 160, 164, 169 and 175.

The following statements of Lieutenant Arthur Carroll form the basis for petitioners' Title VII race and sex discrimination claims: (1) In November or December 1993 Carroll said, "Well, I see all my bitches (or ladies) are here, it must not be that time of the month". (Jt. App. 60); (2) On January 3, 1994, Carroll referred to female officers as the "pussy posse" and "vaginal vigilantes". (Jt. App. 60); (3) On December 16, 1993, Carroll stated that what was different about that particular day was that no black or female officers were present, and this was "like it used to be". (Jt. App. 58); and (4) Some time in early 1994, the wife of the of the plaintiffs telephoned the precinct and allegedly overheard Carroll saying, "[m]other fucking worthless black bitch", "no good black bitch", and "most useless nigger". (Jt. App. 60-61). Carroll made no additional comments of this nature. All of the remarks, except (4), were made during roll call.

The foregoing allegations do not make out a claim for unfavorable treatment because of the race or sex of the seven white male petitioners, and the Amended Complaint was properly dismissed.

2. The petition for a writ of certiorari should be denied because the conduct alleged as forming the basis for petitioners' race and sex discrimination claims under Title VII consists of the mere utterance of epithets and did not create an objectively hostile environment.

To establish a sexually hostile environment claim, petitioners must show the harassment was unwelcome, it was based on their sex, it was sufficiently severe or pervasive to create an abusive working environment, and the employer had actual or constructive knowledge of the hostile environment but took no prompt or adequate remedial action. *Spicer v. Commonwealth*, 66 F.3d 705, 710 (4th Cir. Va. 1995). The mere utterance of an

epithet which generates offensive feelings is not sufficient. If the conduct complained of is not severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, Title VII is not implicated. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), *citing Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In determining whether an environment is hostile or abusive, one must consider all the circumstances, including, but not limited to, the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Id.* at 22. An environment that a reasonable person would find hostile or abusive is a "crucial" prerequisite to establishing a hostile environment case under Title VII. *Oncale*, 118 S. Ct. 1003. The same analysis is used to determine the existence of a racially hostile environment. *Dennis v. County of Fairfax*, 55 F.3d 151, 155-56 (4th Cir. 1995).

First, the boorish and disparaging remarks in (1) and (2) above were not directed at the male plaintiffs, but were obviously directed at females. The remark in (3) although possibly directed at the male plaintiffs, consists of a mere observation, and is obviously not objectively offensive, and the remark in (4) was not said in the presence of or directed at any male or female officer whatsoever. Moreover, these remarks are mere epithets and clearly isolated incidents which fall far short of the requirements of *Harris* for establishing a hostile environment case under Title VII. Further, after extensive discovery and the opportunity to produce evidence in response to respondents' motions for summary judgment, with respect to their racially hostile environment claim, petitioners did not present any evidence that any black officer was even aware of the comments in (3) and (4) above.

Additionally, assuming, *arguendo*, that each of the remarks was brought to the precinct captain's attention (Carroll's supervisor) on January 20, 1994, petitioners made no allegations in their Amended Complaint and produced no evidence that Carroll continued to make such remarks after January 20th. In fact, petitioners admitted that once their complaints were brought to the captain's attention on January 20th, no further remarks or outbursts of temper occurred.[2]

Although petitioners alleged in the Amended Complaint that the conditions of their employment were adversely affected by the loss of camaraderie and teamwork due to Carroll's remarks, their performance obviously did not suffer, as they received numerous commendations and awards and received either standard, above-standard, or exceeds standards on their performance evaluations.[3] Obviously, whatever workplace

---

2. Petitioners admitted that prior to making the remarks alleged in the Amended Complaint, Carroll had not made similar remarks or engaged in conduct indicative of a sexually hostile environment. *See* Record, Exhibit 10 to Defendants' Memorandum in Support of Motion for Summary Judgment, specifically, each petitioner's answer to interrogatory 5. After Hicks was presented with the January 13th letter, Carroll's outbursts of temper and profanity ceased, *See* Record, Harvey Deposition, p. 70, and Carroll did not make any remarks similar to those alleged in the Amended Complaint. *See* Record, Childress Deposition, p. 55; Matassa Dep., p. 34; Mease Dep., pp. 115-116; Noyes Dep., p. 24; Quinney Dep., p. 32.

3. From January 21 to July 15, 1994, Noyes received five commendations for his work, Childress received one on January 14, 1994, Quinney received five from February 18 to July 1, 1994, Stachura received the Excellent Police Duty award on May 29, 1994, and from December 31, 1993 to June 18, 1994, Matassa received three commendations, including a Meritorious Police Duty award. Matassa was also Officer of the Month for August 1994. All petitioners were rated "above standards" on their 1993-94 performance evaluations, except Childress, who was rated "standard", Harvey, who was not evaluated, and Mease, who was rated "exceeds standards". For documentation, *See* Record, Defendants' Motion for Summary Judgment, dated February 27, 1996, p. 17.

atmosphere Carroll's remarks created did not unreasonably interfere with their work performance.

The *Harris* criteria for establishing a hostile work environment were not met in this case, and review by this Court of the dismissal of this claim is not warranted.

3. The decision of the court below in affirming the dismissal of petitioners' Title VII claims was correct because to permit white males to state a claim for relief under 42 U.S.C. § 2000e-2(a)(1), when the discriminatory conduct complained of is directed at blacks or females, ignores the plain causation language of Title VII.

Petitioners claim that their rights under § 2000e-2 of Title VII were violated. Title VII imposes liability for engaging in "unlawful employment practices" and provides, *inter alia*, that

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** *such individual's* **race, color, religion, sex, or national origin**; . . .

42 U.S.C. 2000e-2(a)(1) (emphasis added). Respondent contends that this causation language determines who may file suit under Title VII.

This Court has said that the

> first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular

> dispute in the case. [The] inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Robinson v. Shell Oil Company, 519 U.S. 337, 344 (1997). The phrase "because of such individual's race" (or sex) is plain and unambiguous in a coherent statutory scheme. Section 2000e-2 describes five instances of prohibited employment practices "because of such individual's race, color, religion, sex or national origin." *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(a)(2), 2000e-2(b), 2000e-2(c)(1) and 2000e-2(c)(2). Another portion of the prohibited practices section describes one additional prohibited employment practice by using the phrase "discriminate against **any individual** because of **his** race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(d) (emphasis added). The statutory scheme is obviously consistent in prohibiting discriminatory practices which occur because of the race, color, religion, sex or national origin of the person alleging discrimination and evinces a clear Congressional intent that the discrimination be personal to the individual claiming it. Further, the phrases "to discriminate against any individual . . . because of such individual's race" (or sex) and "discriminate against any individual because of his race" (or sex) could not be plainer. Logically, then, the intent of the statute is served by providing a remedy to those who are the objects of the prohibited practices.

By conferring upon white males the right to file suit essentially alleging that they have been discriminated against because of conduct directed at blacks or females, the "critical causation language"[4] of Title VII will have been effectively re-written to prohibit discrimination "against any individual . . . because of such individual's, or anyone else's, race" (or sex).

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4. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 72 (1996).

Allowing the petitioners to assert their hostile environment claims under Title VII when the discriminatory conduct is directed at blacks or females is inconsistent with rulings of this court which either directly or implicitly have recognized the language of § 2000e-2(a)(1) to require that to be actionable the discrimination in harassment cases occur because of the complaining party's race or sex. *See Oncale v. Sundowner Offshore Services, Inc.*, __ U.S. __, 118 S. Ct. 998, 1002-03 (1998) ("plaintiff must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimina[tion] . . . because of . . . sex") (Justice Thomas, concurring, ". . . the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex' "); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

4. The petition for a writ of certiorari should not be granted because petitioners do not meet the requirements of Article III standing, and the Court has no jurisdiction under Title VII. Addressing the issue of standing requires an analysis of both constitutional and prudential limitations on federal court jurisdiction. This Court recently addressed these limitations in *Bennett v. Spear*, __ U.S. __, 117 S. Ct. 1154, 1161 (1996). To meet Article III requirements,

> a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact", that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Id. at 1163.

Prudential principles guiding the courts include a general prohibition against third-party standing, that is, one "must generally assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Valley Forge College v. Americans United For Separation of Church and State*, 454 U.S. 464, 474 (1982). Another requirement is that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. Although the "zone of interests" test has been largely applied to suits under the APA, it has been applied to other types of cases which did not involve review of federal administrative action, as well, and varies according to the provisions of law under consideration. *Bennett*, 117 S. Ct. 1161. Further, whether a litigant's interest is

> arguably . . . protected . . . by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies . . . The plaintiff must establish that the injury he complains of . . . falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Id. at 1167 (internal quotation marks omitted).

"Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." *Id.* at 1162. The question, then, is whether Congress intended to confer upon one who is not a direct victim of discrimination the right to file suit under Title VII.

Petitioners rely on *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972), in support of their contention that they have standing to pursue a racially and sexually hostile environment claim under Title VII when the basis for their claim is discrimination against others and not themselves. In *Trafficante*, this Court was faced with the question of whether a white person was entitled to sue under § 810 of the Civil Rights Act of 1968 (Fair Housing Act) although blacks were the objects of the discrimination alleged. In addressing that question, this Court examined the language of § 810(a), which provides, *inter alia*, that "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter 'person aggrieved') may file a complaint with the Secretary", 42 U.S.C. § 3610(a), and found it to be "broad and inclusive".[5] *Trafficante*, 409 U.S. at 209. This Court also noted that

> "[w]hile members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered.

Id. at 210. This Court's holding in *Trafficante* permitted a white person to sue based on discrimination against blacks under Title VIII.

The petitioners' reliance on *Trafficante* as permitting white males to sue for discrimination against females or blacks under

---

5. In describing prohibited practices, Title VIII contains four references to discrimination "because of race, color, religion, sex, handicap, familial status, or national origin". Title VIII does not use the language "because of such individual's race".

Title VII is based in significant part on the fact that in its analysis of Title III, this Court cited with approval *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3rd Cir. 1971), a Title VII case which addressed the phrase "person claiming to be aggrieved". *See Trafficante*, 409 U.S. at 209. While it is true that in *Hackett* the Court of Appeals concluded that the language "a person claiming to be aggrieved" shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution, *Hackett*, 445 F.2d at 446, it is important to note that in *Hackett* the plaintiff was alleging discrimination personal to him and that the question of standing the Court of Appeals answered was whether the plaintiff had standing **as a pensioner** to sue for direct discrimination under Title VII.[6] The Court of Appeals concluded that Hackett satisfied the requirements for Article III standing and could assert his claim of direct discrimination.

The mere fact that Article III standing exists with respect to a plaintiff claiming direct discrimination does not mean that Article III standing should be found with respect to the petitioners in the instant case, and it does not mean that anyone can allege a violation of civil rights not personal to them in order to effectuate the purposes of Title VII. If the citing of *Hackett* in *Trafficante* is a resounding endorsement of anything, it is an endorsement of the proposition that a person claiming direct discrimination can sue under Title VII for redress provided he can meet the requirements for Article III standing. As indicated above in section 3, the critical causation language of the Title VII provisions describing prohibited practices is a clear

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6. The district court dismissed Hackett's suit on the basis that as a pensioner, he was not an employee within the meaning of Title VII. *Hackett*, 445 F.2d at 445. In concluding that a pensioner was indeed entitled to sue under Title VII, the Court of Appeals found that the "person claiming to be aggrieved" language in Title VII showed a congressional intent to define standing as broadly as Article III permits. *Id.* at 446.

indication of an intent to make the discrimination actionable under Title VII personal to the individual claiming it. Further, prudential standing principles were specifically negated in *Trafficante* with respect to Title VIII when Congress used the "any person" language indicating an intent to give the broadest possible range of individuals a right to sue to enforce Title VIII.

Additionally, unlike Title VIII, which did not provide an administrative agency with enforcement powers, Title VII provides an administrative agency with broad enforcement powers to administer Title VII. So while the need for "private attorneys general" to enforce Title VIII is glaring, the lack of such a need for the enforcement of Title VII is equally apparent by virtue of the existence of the EEOC.

Petitioners suffered no distinct and palpable injury, but rather complain of being the beneficiaries of favorable treatment that was not alleged to deprive them of the benefits of interracial or intergender relations with their fellow black or female officers. If females or blacks are the direct victims of the discrimination, males and whites are the indirect beneficiaries. If whites and males are the indirect beneficiaries of the discrimination, to allow petitioners to sue and benefit again from being in a favored employment status does nothing to serve the purposes of Title VII. Petitioners have not been injured by being the beneficiaries of better treatment than their coworkers.

Petitioners allege that Carroll's remarks interfered with "teamwork", but nowhere have they alleged, and extensive discovery produced no evidence whatsoever, that white officers refused to work with black officers, that black officers refused to work with white officers, that female officers refused to work with male officers or that male officers refused to work with female officers.

5. The petition should be denied because petitioners are not persons claiming to be aggrieved within the meaning of Title VII. Although the term "person aggrieved" is specifically defined in the Fair Housing Act, the phrase "a person claiming to be aggrieved" is not specifically defined in Title VII. As Circuit Judge Luttig observes in his concurring opinion,

> [i]n the law, the phrase "aggrieved person" has long been a "term of art" ordinarily understood to mean those persons who could satisfy both prudential and constitutional standing limitations.

Childress v. City of Richmond, 134 F.3d 1205, 1208 (4th Cir. 1998), *citing Director, OWCP v. Newport News*, 514 U.S. at 125 (1995) (Luttig, J., concurring). "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." *Bennett*, 117 S. Ct. 1162. If it chooses to do so, Congress may override prudential standing limitations and authorize all persons who satisfy Article III requirements to bring a particular lawsuit in federal court, such as it did with the Fair Housing Act.

> But where it has not done so, and instead has simply invoked the term of art "aggrieved person", the default rule generally is that Congress has created a cause of action only for those persons who can satisfy both types of standing requirements — constitutional and prudential.

Childress, 134 F.3d 1209. The prudential rule against standing requires that a party assert his own statutory rights and not those of third parties. Applying this analysis to Title VII, the prudential rule against third-party standing requires the petitioners herein to assert only those rights Title VII confers upon them, which are to be determined from examining the practices this statute prohibits.

Petitioners filed their Title VII claim alleging that respondents violated § 2000-e of Title VII, which describes unlawful employment practices. As noted above, the causation language contained in § 2000-e, "because of such individual's race, color, religion, sex, or national origin", requires a showing that the discrimination occurred because of the complaining party's race, color, religion, sex or national origin.

Additionally, notwithstanding the general similarity of purpose served by both the Fair Housing Act and Title VII — the eradication of discrimination — the language contained in Title VII shows an intent to protect direct victims of discrimination. Although the loss of important benefits of interracial associations can apply with equal force in either a housing or an employment discrimination case, employment discrimination involves consequences to the victim that are far more personal and that can have a far more devastating personal effect. In an employment case, the loss of a job and corresponding loss of income to an individual, the loss of a promotion, loss of status, denial of opportunities for upward mobility, the loss of pay, loss of benefits, the imposition of disciplinary action can have a profoundly negative effect on the individual experiencing them.

Moreover, before the statute was amended in 1991 to allow recovery of compensatory damages, the remedies under Title VII, which include reinstatement or hiring of employees, back pay, front pay, *inter alia,* are appropriate to victims of direct discrimination, and would never be appropriate to a beneficiary of discrimination because such a person would already be in a favored status with respect to those items. The original intent of the statute could not have been to allow persons to assert the rights of others, as the statute provided no compensation to those who did not suffer a job detriment. Petitioners have not noted anything that would support a change in this intent in the Civil Rights Act of 1991 or anywhere else.

6. The petition should not be granted with respect to petitioners' opposition retaliation claim because the trial court was without jurisdiction to hear it, because it was time-barred, and because petitioners suffered no adverse employment action.

Title VII prohibits an employer from retaliating against individuals for opposing unlawful practices or for participating in investigations, proceedings, or hearings in connection with claims of discrimination.

> It shall be an unlawful employment practice for an employer to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 20006-3(a).

To establish a *prima facie* case of retaliation, one must show

> 1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action.

Balazs v. Liebenthal, 32 F.3d 151, 158 (4th Cir. 1994); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). Once a *prima facie* case is established, a presumption of retaliation arises, which the employer may rebut. The employee may then show that the employer's explanation is pretextual. *Id.* at 365. The filing of a formal EEOC charge is not always required. However, allegations contained in an administrative

charge of discrimination generally operate to limit the scope of a subsequent judicial complaint.

> Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit.

Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 962-63 (4th Cir. 1996). When a formal charge of retaliation is not made with the EEOC, the employee must allege that he informed the EEOC that he was retaliated against for opposing unlawful practices. *Johnson v. General Elec.*, 840 F.2d 132, 139 (1st Cir. 1988). When claiming retaliation for opposition to a practice made unlawful by Title VII, an employee must have an objectively reasonable belief in the validity of the underlying charge. *See Gifford v. Atchinson, Topeka and Santa Fe Ry. Co.*, 685 F.2d 1149, 1156-57 (9th Cir. 1982); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982). Adverse employment actions pertain to "ultimate employment decisions" including "hiring, granting leave, discharging, promoting and compensating." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981), *cert. denied*, 454 U.S. 892 (1981). *See also Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996) ("a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities"). A negative comment in an employee's performance evaluation does not constitute adverse employment action *See Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 755 (4th Cir. 1996).

Petitioners alleged that respondents retaliated against them for assisting two female officers with their complaints of discrimination and for opposing discriminatory practices. This

opposition-retaliation claim was never presented to the EEOC and was raised for the first time in the Amended Complaint, which was filed with the trial court on December 8, 1995.

The trial court examined the "male officers' charge-filing forms, and the affidavits to the EEOC in the plaintiff's summary judgment exhibit entitled "PLAINTIFFS' EEOC RETALIATION CHARGES" and concluded that those items "nowhere mention this new theory."[7] The trial court, therefore, made a specific factual finding that the opposition-retaliation claim of petitioners was never presented to the EEOC. The petitioners have not challenged this factual finding. Further, petitioners did not allege in their Amended Complaint that they had informed the EEOC of their claim of retaliation for assisting the females in opposing discrimination.

Petitioners variously claimed that respondents retaliated against them by giving them negative ratings on their performance evaluations, by denying time off, by counseling one of them about working unnecessary overtime, or by changing their assignments. Not only were these claims either unsupported by any evidence or done for legitimate reasons[8], but they also did not involve "adverse employment action" within the meaning of Title VII.

7. The writ should not be granted with respect to petitioners' participation-retaliation claim because they have failed to present any reason why the award of summary judgment to respondents was improper and because they suffered no adverse employment action. Petitioners' participation-retaliation claims are based on their allegation that the respondents retaliated against them for

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7. *See* Appendix to Petition for Writ of Certiorari, p. 20a.

8. For a detailed discussion of each claim of retaliation, please refer to Appendix, p. 1a-8a.

filing their initial EEOC charge. The court below affirmed the trial court's award of summary judgment to respondents on the basis that petitioners failed to produce any evidence that any of the retaliation claimed was motivated by the filing of their EEOC charges. The petitioners have not seriously challenged the trial court's conclusion on this point. They only state on page 18 of their Petition for Writ of Certiorari, "[t]he record in the Fourth Circuit Court of Appeals shows otherwise. (*See, e.g.*, App. 61a-62a)." These two cited pages of the appendix consist of an excerpt from the deposition testimony of Lieutenant Arthur T. Carroll, who expressed his opinion about the involvement of petitioners Childress, Mease and Harvey. This excerpt standing alone falls far short of evidence showing that the filing of their original EEOC charges was the motivation for any retaliation petitioners claimed. Additionally, as stated above in connection with the discussion of the opposition-retaliation claims, none of the acts claimed as retaliation constituted adverse employment action. Consequently, the retaliation claims were properly dismissed.

8. The petition should be denied because the decision of the court below does not conflict with decisions of this Court and those of other Courts of Appeals. With respect to the Title VII claims, including the retaliation claims, the court below affirmed the decision of the district court by an *en banc per curiam* decision of an equally divided court. Opinions which are affirmed by an equally divided *en banc* Court of Appeals have no precedential value. *Nichols v. United States*, 511 U.S. 738, 750 (1994); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 759 (1984), *rehearing denied*, 466 U.S. 994 (1984). Because the decision of the court below created no precedent, any conflict is merely illusory, and petitioners have cited no other opinions of any court indicating a conflict exists.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM BRIEF OF APPELLEES, *CHILDRESS, et al. v. CITY OF RICHMOND, et al.*, RECORD NO. 96-1585, DATED SEPTEMBER 9, 1997

[Commencing at page 20]

to these claims, then dismissal on summary judgment was appropriate. To prevail on a retaliation claim plaintiffs must show they engaged in protected activity, they suffered adverse employment action, and there was a causal connection between the protected activity and the adverse action. *Balazs v. Leibenthal,* 32 F. 3d. 151, 159 (4th Cir. 1994). The fact that alleged retaliatory conduct occurs after an employee engages in protected activity may be sufficient to establish a causal connection between the protected activity and such conduct. However, an employer's mere knowledge that an employee has engaged in protected activity is insufficient to counter substantial evidence of legitimate reasons for the adverse action. *Williams v. Cerberonics, Inc.*, 871 F. 2d 452, 457 (4th Cir. 1989). Adverse employment action pertains to "ultimate employment decisions" including "hiring, granting leave, discharging, promoting and compensating." *Page v. Bolger,* 645 F. 2d 227, 233 (4th Cir. 1981), *cert. denied,* 454 U.S. 892 (1981).

The evidence in this case clearly shows that plaintiffs engaged in protected activity by filing their EEOC complaints. However, the evidence fails to show they suffered any adverse employment action, and in any event, the unrebutted evidence clearly showed that the city had legitimate, non-pretextual reasons for taking the actions it did.

Plaintiffs Matassa, Noyes, Quinney, Stachura and Childress claim retaliation with respect to their 1994 performance evaluations. Specifically, Matassa claims retaliation because he [21] received a "standard" rating on his evaluation although his total point score was 416.5, which should have resulted in an

"above standard" overall rating. However, the City provided evidence that Sgt. David McCoy originally rated Matassa "standard" notwithstanding his numerical score because Matassa had received two days of suspension during this evaluation cycle and believed this rating was required by City policies. However, Matassa's original evaluation was returned by the departments' Administrative Services Operation for correction, and McCoy subsequently recommended that Matassa receive an "above-standard" rating, and the "standard" overall rating was removed from Matassa's evaluation. (See Record, Exhibit A attached to Defendants' Reply Brief, dated March 14, 1996). This claim fails for failure to show adverse employment action.

Matassa also claimed retaliation because Carroll told him in July 1994 that he could have Christmas Day off, but failed to schedule him off on that day. Matassa filed a grievance and met with his immediate supervisor, Sgt. Leslie Stone, who denied the grievance because he felt Carroll had complete authority to schedule time off (except vacation) as he saw fit. Stone also concluded that Matassa's claims of retaliation for going to the EEOC were without merit because he had not personally observed that Carroll had singled anyone out for retaliatory reasons. (See Record, Exhibit B attached to Defendants' Reply Brief, dated March 14, 1996). Matassa pursued his grievance further, and was subsequently advised he could have Christmas Day off. (See Record, [22] Exhibit C attached to Defendants' Reply Brief, dated March 14, 1996). This retaliation claim fails, too, because Matassa can show no adverse employment action in as much as this situation was effectively remedied throughout the City's grievance procedure.

Plaintiff Noyes claims retaliation because he was counseled upon his supervisor and fellow plaintiff Harvey's

recommendation[3] for not taking his "EDO" (extra day off) in violation of a Police Department rule, which resulted in the City having to pay him unnecessary overtime. He admitted he did not take his EDO, that he received overtime pay as a result of failing to take the day off, and that he was counseled, but not disciplined, in connection with this infraction. (See Record, Noyes Deposition, P. 48). Noyes merely counseled and suffered no adverse employment action. Further, the fact that the recommendation for counseling came from his fellow plaintiff indicates it was not done for retaliatory reasons. The City's right to discourage employees from creating unnecessary overtime costs is clearly a legitimate reason to counsel Noyes, particularly when he was aware of the police department's policy regarding the same. This retaliation claim fails because there was no adverse employment action and because the uncontroverted evidence shows a legitimate reason for counseling Noyes.

Noyes also claimed retaliation because the comment ". . . during this rating period his actions have undermined the actions [23] of supervisors." (Jt. App. 186). Noyes' retaliation claims must fail. Other officers who signed the January 13th memorandum and participated in related events, but who did not file EEOC charges, received the same notations on their performance evaluations. (Jt. App. 241, 246, 248.)

Additionally, Noyes presented no evidence that he suffered any adverse impact from his comment being in his evaluation. No promotional examinations were given, and even if they had been, only the overall numerical rating, not individual comments, are reviewed when an officer is considered for promotion, according to Major Wille C. Jones, the City's Fed.

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3. See Record, Noyes deposition, p. 52, and Exhibit 13 to this deposition.

Appendix A

R. Civ. P. Rule 30(b) (6) designee on matters of personnel policy and procedure and then Deputy Chief of Administrative Services in charge of personnel, training, maintenance, and central records. (Jt. App. 796). The evaluations were not used to determine pay. (See Record Deposition of Wille C. Jones, p. 57, 62, 63, 64, 77). Besides this Court noted in *Hopkins, supra,* that when Hopkins' overall ratings on his evaluation remained the same, even though his supervisor wrote he needed improvement in job behavior and work relations, he did not suffer any adverse employment action. 77 F. 3d. 745 at 755. Therefore, this retaliation claim fails, as well.

Plaintiff Quinney alleged in the Amended Complaint that "he was given a negative rating on his performance valuation . . . for failure to follow the 'chain of command' ". (Jt. App. 68). However, Quinney received a total of 442.5 points on his evaluation, which gave him an above standards rating. Had he [24] received the maximum allowable points for the Personal Relations category about which he complains, his overall score would have still resulted in an "above standards" rating. (See Record, Quinney Deposition, Exhibit 3 [performance evaluation])[4]. He did not suffer any adverse employment action as a matter of law, and this retaliation claim must fail.

Plaintiff Stachura, who received an overall "above standards" rating on his evaluation, also claims the City retaliated

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4. Quinney received 3 out of 5 points for the component of Personal Relations for which he was criticized for failure to follow the chain of command. Had he received the maximum allowable 5 points for this category, his overall personal relations score would have increased from 12.6 to 13.8, which. When multiplied by 5 (see last page of evaluation) would have resulted in a total score of 448.5, which is still in the "above standards" category.

against him by including a critical comment about failure to follow the chain of command. (Jt. App. 197). This retaliation claim, like Noyes', fails because Stachura failed to show any adverse impact on his employment.

Stachura also claims retaliation because his scores in the Personal Relations category were "unsatisfactory". (Jt. App. 197). The maximum score allowable in each of the five components of the Personal Relations category is five (5) points. He was awarded five (5) points for three of these components. Had he received the maximum of five (5) points for each of the five components, his total score would have still resulted in an "above standards" rating.[5] He did not suffer any adverse employment action, and his [25] retaliation claim fails.

Plaintiff Childress claims retaliation in connection with his 1994 performance evaluation because he was given a "standard" rating and believed his rating should have been higher. He apparently contends that Carroll's comments that he "did not follow the chain of command; ignored rules and regulations and caused subordinates to do the same . . ." were undeserved. (Jt. App. 191). The City presented evidence that Childress never discussed with Carroll any problems that Carroll might have

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5. Stachura's evaluation appears in the Record as Exhibit 4 to his deposition. Scores for individual components appear on page six of his evaluation, and his overall score appears on page seven.

Receiving five points for each component would have resulted in a total score for the Personal Relations category of 15 points instead of the 11.4 he received. Multiplying these 15 points by 5 (see page 7) would have resulted in a score of 75 instead of 57 in the personal relations category, which would have increased his overall score by 18 points for a total evaluation score of 435, which is still in the "above standards" category.

created before signing on to the January 13th memorandum, that he failed to notify Hicks of any problems Carroll was creating, that he participated in another letter sent to a city councilman about superior officers, allowed subordinates to violate rules and regulations and participated with them in these violations. (See Record, Exhibit D to Defendants' Reply Brief, dated March 14, 1996). However, in response to the City's motion for summary judgment Childress offered no proof whatsoever that Carroll's comments were unjustified or that his performance justified a higher rating during this evaluation period. In short, Childress did not meet his burden of proving retaliation.

In his response to the motion for summary judgment, Childress claims that "in his 'investigation' Hicks found no negative [26] information on Childress justifying the negative performance review for Childress. (Hicks Dep. pp. 155-60)." (See Plaintiff's Response in Opposition to Defendants' Second Motion for Summary Judgment, p. 13).

First according to Hicks' Affidavit (See Record, Exhibit 6 to Defendant's Motion for Summary Judgment, p. 1), he was not aware of and did not investigate the retaliation claims of any of the plaintiffs because they did not bring them to his attention prior to going to the EEOC. Second, a careful reading of pages 155-60 of Hicks' deposition (Jt. App. 737-742) simply indicates that he had no personal knowledge of Childress' day-to-day performance, the particulars of the evaluation were left to the first-line supervisor, and he had no authority to dictate changes. (Jt. App. 740). Contrary to Childress' contention, these pages of Hicks' deposition can not reasonably be construed as a categorical admission that there was no evidence supporting Carroll's evaluation of Childress. Plaintiffs Harvey and Mease

claim retaliation because they were transferred from Second Precinct. Mease was transferred to a day shift on First Precinct (Jt. App. 676), and Harvey was transferred to Headquarters to work in the warrants and information section (Jt. App. 676) because no other sergeants positions were available at the time (See Record, Hicks Deposition, p. 33-34).

The City presented evidence that Hicks recommended their transfers because morale on the platoon had suffered greatly and because both Harvey and Mease had indicated during the [27] investigation of the January 13th memorandum that they were either afraid of or intimidated by Carroll and did not wish to continue working him. Additionally, the platoon sergeants indicated to Hicks that serious safety issues had arisen because the fallout from the January 13th episode had divided the platoon. The lieutenants and sergeants on two shifts had indicated to Hicks that some day shift officers were no longer backing each other up, that some officers remained out of service longer than they should while others answered calls alone, that some officers openly expressed negative feelings toward others vis-a-vis signing the January 13th memorandum, and the precinct lieutenants had become concerned that an officer might get injured as a result. (Jt. App. 216). Obviously, these were serious problems reflecting legitimate concerns which the City was required to resolve.

Hicks considered the foregoing problems resolved by the transfer of Harvey and Mease because no subsequent problems of this nature came to his attention after the transfers. (Jt. App. 673). There is absolutely no evidence in this record to suggest that these were no legitimate business concerns the City needed to address. It was incumbent upon Harvey and Mease to produce evidence indicating otherwise, or that the problems were not

resolved by their transfers. They failed to do either, and the record before this Court indicates that they were transferred for legitimate, non-pretextual reasons. The retaliation claims of Mease and Harvey, therefore, must fail.

All plaintiffs maintained their ranks, received the same pay,

* * *